159

(1)

Supreme Court, U.S.
FILED

091289 APR 23 2010

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

MICHAEL L. MCGEE

Petitioner,

v.

BYRAN BARTOW,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEROLD S. SOLOVY
Counsel of Record
DAVID J. BRADFORD
ERIC J. SCHWAB
JENNER & BLOCK LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 222-9350
jsolovy@jenner.com

April 23, 2010

Counsel for Petitioner

QUESTION PRESENTED

Whether Due Process permits the indefinite civil confinement of a convicted sex offender based on any purported psychiatric diagnosis that is not "patently lacking in credibility or validity," "empty of scientific pedigree" or "near-universal in its rejection by the mental health profession."

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. Background 7

REASONS FOR GRANTING THE WRIT 12

A. THE SEVENTH CIRCUIT FAILED TO IDENTIFY OR APPLY EVEN A *DE MINIMIS* DUE PROCESS STANDARD TO DETERMINE THE RELIABILITY OF THE PSYCHIATRIC DIAGNOSES UPON WHICH MR. MCGEE'S LOSS OF LIBERTY IS BASED 12

B. THE QUESTION PRESENTED IS CENTRAL AND RECURRING IN THE ADJUDICATION OF SEX OFFENDER CIVIL COMMITMENTS, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT. 17

CONCLUSION 20

TABLE OF APPENDICES

Appendix A – *McGee v. Bartow*
593 F.3d 556 (7th Cir. 2010) 1a-58a

Appendix B – *McGee v. Bartow*
No. 06-C-1151, Decision and Order
(August 23, 2007) 59a-65a

Appendix C – *McGee v. Bartow*
No. 06-C-1151, Memorandum Decision
and Order Denying Motion to Dismiss
(April 3, 2007) 66a-77a

Appendix D – Wis. Stat. Ann.
Ch. 980 ..... 78a

Appendix E – United States Constitution,
14th Amendment 79a

TABLE OF AUTHORITIES

CASES

Commonwealth v. Squire,
278 Va. 746, 752, 685 S.E.2d 631, 633 (2009) 6

Hubbart v. Super. Ct.,
19 Cal.4th 1138, 1144, 81 Cal.Rptr.2d 492, 969 P.2d 584 (1999) 6

In re Adams,
588 N.W.2d 336, 340 (Wis. Ct. App. 1998) 7

Kansas v. Crane,
534 U.S. 407, 413 (2002) ..... passim

Kansas v. Hendricks,
521 U.S. 346 (1997) 4, 5, 13, 14

Orozco v. Kramer,
No. CV 08-3291 AHM (CT), 2009 WL 1033610, at *21 (C.D. Ca. April 14, 2009) 6

United States v. Abregana,
574 F. Supp.2d 1145, 1154 (D.Haw. 2008) 18

United States v. Graham,
--- F. Supp.2d ---, No. 07-12065-JLT,
2010 WL 457445, at *1 (D.Mass. Feb
8, 2010) 6, 18

United States v. Shields,
No. 07-12056-PBS, 2008 WL 544940,
at *2 (D.Mass. Feb. 26, 2008) 18

CONSTITUTIONAL PROVISIONS

United States Constitution Am. XIV 1

STATUTES

28 U.S.C. § 1254(1) 1

Wis. Stat. Ann. § 980.01 (2003) 7

OTHER AUTHORITIES

1 American Psychiatric Association,
Treatment of Psychiatric Disorders
617-633 (1989) 13

Abel & Rouleau, *Male Sex Offenders, in Handbook of Outpatient Treatment of Adults* 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990) 13

Allen Frances *et al.*, *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. Am. Acad. Psychiatry & L. 375 (2008) 19

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000) 5

Holly A. Miller *et al.*, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 Law & Hum. Behav. 29-54 (2005) 15

Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 Law & Hum. Behav. 357-368 (2004) 15

Richard Wollert, *Poor Diagnostic Reliability, the Null-Bayes Logic Model, and Their Implications for Sexually Violent Predator Evaluations*, 13 Psychol. Pub. Pol'y & L. 167-203 (2007) 15

Robert A. Prentky *et al.*, *Commentary: Muddy Diagnostic Waters in the Courtroom*, 36 J. Am. Acad. Psychiatry & L. 455-458 (2008) 5

Robert A. Prentky *et al.*, *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 Psychol. Pub. Pol'y & L. 357-393 (2006) 15

Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. Sex. Offender Civ. Commitment 17-82 (2005) 15

Thomas K. Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. Am. Acad. Psychiatry & L. 459-469 (2008) 5

PETITION FOR A WRIT OF CERTIORARI

Michael L. McGee ("McGee") respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 593 F.3d 556 (7th Cir. 2010), and reprinted in the appendix to this petition ("Pet. App.") at 1a-58a. The decision and order of the district court is reported at No. 06-C-1151, 2007 WL 2442252 (E.D.Wis. Aug. 23, 2007), and is reprinted at Pet. App. 59a-65a. The district court's memorandum decision and order denying motion to dismiss is reported at No. 06-C-1151, 2007 WL 1062175 (E.D.Wis. Apr. 3, 2007), and reprinted at Pet. App. 66a-77a.

JURISDICTION

The court of appeals entered its judgment on January 27, 2010. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> *. . . nor shall any state*
> *deprive any person of life,*

liberty, or property, without due process of law.

STATUTES INVOLVED

The relevant provisions of Wisconsin Statutes Chapter 980, Sexually Violent Person Commitments, is reprinted in the appendix to this petition at Pet. App. 78a.

STATEMENT OF THE CASE

A. Introduction

Due process permits the indefinite civil confinement of a convicted sex offender as a "sexually violent person" ("SVP") only where there is "proof of *serious* difficulty in controlling behavior . . . *sufficient* to distinguish the dangerous sexual offender whose *serious* mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (emphasis added).

In the eight years since *Crane*, state and federal courts have yet to determine whether, as a matter of due process of law, any minimum substantive standard governs when a psychiatric diagnosis is "sufficient" and "serious" enough to support a legal determination of "mental illness, abnormality, or disorder" for the purpose of SVP confinement. In the opinion below, the court of appeals upheld Mr. McGee's civil commitment based on less than a constitutionally *de minimis* standard for assessing the reliability of the psychiatric diagnosis relied upon to justify indefinite civil confinement. Specifically, the court of appeals held that due process allows virtually any diagnosis of a purported psychiatric "disorder" proffered by State-employed SVP examiners to serve as the requisite evidence of serious mental illness, as long as that diagnosis is not "patently lacking in credibility or validity," "empty of scientific pedigree" or "near-universal in its rejection by the mental health profession." Pet. App. 51a, 57a.

The Seventh Circuit's ruling reflects the crying need for this Court's guidance about the level of reliability required by due process for a psychiatric diagnosis that is relied upon as the basis for indefinite civil detention. In both *Crane* and *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court established that ongoing scientific developments and professional debates about medical *terminology* should not be enough to invalidate a legal finding of "mental disorder" when that finding is based on an *otherwise valid and reliable* psychiatric diagnosis. *See Hendricks*, 521 U.S. at 358-59 ("We have traditionally left to legislators the task of defining *terms* of a medical nature that have legal significance. . . . Often, those *definitions* do not fit precisely with the *definitions* employed by the medical community.") (emphasis added); *Crane*, 534 U.S. at 415 ("Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments.").

The Court has never held, however, that due process permits reliance on a "mental disorder" that is *not* recognized as valid and reliable by the psychiatric community, as long as that diagnosis is not "patently lacking in credibility or validity," "empty of scientific pedigree" or "near-universal in its rejection by the mental health profession." Pet. App. 51a, 57a. In *Crane*, for example, this Court characterized the civil commitment approved in *Hendricks* as predicated on "the presence of what the psychiatric profession itself classifie[d] . . . as a serious mental disorder." 534 U.S. at 412. Indeed, this Court's precedents have dealt with factual

circumstances involving psychiatric diagnoses that were recognized (or undisputed) as scientifically valid and empirically reliable evidence of psychiatric impairment. *Hendricks*, 521 U.S. at 360 (pedophilia); *Crane*, 534 U.S. at 411 (exhibitionism, antisocial personality disorder). *See also Seling v. Young*, 531 U.S. 250, 256 (2001) (respondent did not challenge "severe" diagnosis of "not otherwise specified" disorders).

Increasingly, since *Hendricks* and *Crane*, SVP commitments rely on purported "not otherwise specified" ("NOS") diagnoses, derived from catchall categories found in the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. ("DSM").[1] By definition, these "diagnoses" are not specified in the DSM as reliable indicators of a recognized psychiatric disorder.[2]

Yet there is no clear constitutional standard by which courts review the reliability of those diagnoses, which freely depart from the DSM criteria or any other established system of empirical verification. *Crane* did not address this issue, and since *Crane*, state and federal courts have failed to agree on what minimum due process standard, if any, governs the psychiatric diagnosis used to

---

[1] American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000).

[2] Commentators have criticized the "unbridled use of NOS categories" by forensic examiners in SVP trials. *See* Thomas K. Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. Am. Acad. Psychiatry & L. 459, 464 (2008). *Accord*, Robert A. Prentky *et al.*, *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. Am. Acad. Psychiatry & L. 455, 456 (2008).

support a legal finding of a "mental disorder" when a recognized diagnosis is not presented.[3]

The decisions of the district court and the court of appeals in this case reflect the lack of even a minimal due process standard for diagnostic reliability. *See, e.g.,* Pet. App. 47a (fact finder may rely on any diagnosis not shown to be "devoid of content"); Pet. App. 62a ("[T]here are no magic diagnoses . . . . [A]ll that is required is a mental condition predisposing the defendant to commit acts of sexual violence"). Instead, those decisions accept a diagnosis as presumptively reliable if the *accused* is unable to prove that his diagnosis has not yet been wholly (or "near-universal[ly]") *rejected* by the psychiatric profession. This is a "standard" that virtually every diagnosis will meet because – by definition – the profession has not yet subjected *ad*

---

[3] *Compare Commonwealth v. Squire*, 278 Va. 746, 752, 685 S.E.2d 631, 633-34 (2009) ("[T]he mere use of the phrase mental abnormality or personality disorder does not automatically invoke a conclusion that a respondent is likely to engage in sexually violent acts.") *and United States v. Graham*, --- F. Supp.2d ---, No. 07-12065-JLT, 2010 WL 457445, at *1 (D.Mass. Feb. 8, 2010) (holding that diagnoses from government witnesses of antisocial personality disorder and paraphilia not otherwise specified (nonconsent) "failed to establish by clear and convincing evidence that Respondent suffers from a serious mental illness, abnormality, or disorder . . .") *with Orozco v. Kramer*, No. CV 08-3291 AHM (CT), 2009 WL 1033610, at *21 (C.D. Cal. Apr. 14, 2009), *citing Hubbart v. Super. Ct.*, 19 Cal.4th 1138, 1144, 81 Cal.Rptr.2d 492, 469, 969 P.2d 584, 588 (1999) (holding that under California state law "there is no limit on the mental disorders that may serve as the basis for civil commitment [as an SVP]").

hoc and non-standard diagnoses to empirical testing or peer review.[4]

Because the issue recurs frequently in state and federal courts across the country and the law remains unsettled, this Court's review is warranted.

B. Background

1. Under Chapter 980 of the Wisconsin Statutes, a person convicted of a sexually violent offense who has served his sentence may be indefinitely civilly committed by the state as a "sexually violent person" if that person is found to be "dangerous because [he] suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. Ann. § 980.01(7) (2003); Pet. App. D, 78a. The statute defines "mental disorder," in turn, as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *Id.* § 980.01(2); Pet. App. 78a. Wisconsin courts have interpreted the statutory term "mental disorder" to include antisocial personality disorder. *In re Adams*, 588 N.W.2d 336, 340 (Wis. Ct. App. 1998).

2. Mr. McGee was convicted of burglary and sexual assault in 1987 and sentenced to eight years' imprisonment and six years' probation. Pet. App. 2a. While on parole in 1992, Mr. McGee was

---

[4] *See* Zander, *supra* note 1, at 465 ("NOS diagnoses are the antithesis of 'reasonable certainty,' because they are *ad hoc* applications based on the idiosyncratic opinion of an individual diagnostician, not the consensus of recognized thought that would be reflected in a specified diagnosis.").

twice accused of sexual assault; the accusations resulted in the revocation of Mr. McGee's parole but did not lead to criminal conviction. Pet. App. 2a-3a. In 1995 the State of Wisconsin committed Mr. McGee as an SVP but a state court later reversed that commitment, concluding that Mr. McGee's counsel during the commitment trial was ineffective for failing to discover evidence that undermined the credibility of Mr. McGee's accusers in the alleged 1992 assaults. Pet. App. 3a. Released from civil confinement in 1999, Mr. McGee's parole was revoked in 2000 for alleged drug use and for contact with one of Mr. McGee's 1992 accusers. Pet. App. 3a.

Prior to Mr. McGee's scheduled release from prison in 2003, the State of Wisconsin again sought to commit him as an SVP. Pet. App. 3a. During the SVP trial, the State presented two SVP examiners, psychology Ph.D.s employed by the State of Wisconsin, as expert witnesses. Pet. App. 3a-6a. Both examiners testified based solely on having reviewed Mr. McGee's record, without having interviewed or examined Mr. McGee personally. Pet. App. 4a-5a. One of those witnesses testified that the record did not support diagnosing Mr. McGee with an antisocial personality disorder or any sexual disorder, yet he nonetheless diagnosed Mr. McGee with what he termed a "personality disorder not otherwise specified with antisocial features," based on a review of Mr. McGee's prison disciplinary record. Pet. App. 4a-5a. The other examiner also found insufficient evidence to support a specific personality disorder but diagnosed Mr. McGee nonetheless with "personality disorder not otherwise specified with antisocial features." Pet. App. 5a, 50a.

The second examiner also diagnosed Mr. McGee with what she described as "paraphilia [*i.e.*, sexual disorder] not otherwise specified," citing as evidence the unproved allegations of sexual assault from 1992, despite the fact that the problematic credibility of those accusations led to the reversal of Mr. McGee's first SVP commitment. Pet. App. 5a.

Mr. McGee represented himself *pro se* in his SVP trial and refused to participate in the second day of the trial, and thus did not cross-examine the second expert witness. Pet. App. 6a. Based on the State's examiners' testimony, the trial court ruled from the bench that Mr. McGee suffered from an unspecified "mental disorder" within the meaning of the statute and ordered him committed as an SVP pursuant to Wisconsin Chapter 980. Pet. App. 6a.

3. Following his commitment, Mr. McGee filed a *pro se* motion for relief from judgment, arguing, *inter alia*, that the "not otherwise specified" diagnoses used in his case were neither valid nor sufficient to justify civil commitment as an SVP. Pet. App. 8a. The motion was denied, and Mr. McGee appealed his commitment order to the Court of Appeals of Wisconsin, which affirmed. Pet. App. 8a. Mr. McGee then filed a petition for collateral relief, arguing that his appointed appellate counsel was ineffective for failing to raise the due process issue regarding the validity and sufficiency of the diagnoses. Pet. App. 9a-10a. The state court of appeals denied that motion without specifically addressing Mr. McGee's claim that his commitment based on invalid and insufficient psychiatric diagnoses violated due process. Pet. App. 10a-11a.

The Supreme Court of Wisconsin denied review. Pet. App. 11a-12a.

4. Mr. McGee then filed a habeas petition *pro se* in the U.S. District Court for the Eastern District of Wisconsin, again arguing that his civil commitment was based on invalid diagnoses that were not accepted in the psychiatric community and thus did not meet the due process standard set forth in *Crane*. Pet. App. 12a-13a. The State of Wisconsin moved to dismiss the petition, claiming that Mr. McGee had procedurally defaulted his due process claims by failing to exhaust them in the Wisconsin courts. Pet. App. 14a. The district court denied the State's motion, ruling that Mr. McGee had presented his due process claims to the state courts but the state courts had failed to address them, therefore the district court was free to "dispose of the matter as law and justice require." Pet. App. 15a-16a; *see* Pet. App. C, 66a-77a (Memorandum Decision and Order Denying Motion to Dismiss). The district court then denied the habeas petition, holding that there are no "magic diagnoses" for due process purposes as long as Mr. McGee was properly "found to be an SVP based on testimony that he had a mental disorder that caused him to have serious difficulty controlling his behavior." Pet. App. 16a-17a; *see* Pet. App. B, 59a-65a (Decision and Order).

5. The court of appeals affirmed. Pet. App. 2a; *see* Pet. App. 1a-58a. The court acknowledged that the purported diagnosis of "personality disorder not otherwise specified with antisocial features" was at "variance" with the diagnostic criteria in the DSM for any personality disorder diagnosis, but held that

the diagnosis could serve as the basis for the legal determination that Mr. McGee was an SVP as long as it was not so "patently lacking in credibility and validity" that the trial court was precluded from considering it. Pet. App. 50a-52a. The court of appeals also acknowledged that the other diagnosis, "paraphilia not otherwise specified (nonconsent or rape)," was the subject of continued controversy concerning its lack of established validity and reliability. Pet. App. 52a-55a. But again, the court held that it was bound to accept any diagnosis that was not "so unsupported by science that it should be excluded absolutely from consideration by the trier of fact." Pet. App. 55a. While noting that the psychiatric profession's objections to the paraphilia NOS diagnosis are "not without persuasive value," the court of appeals held: "Given the present state of Supreme Court precedent, however, we cannot conclude that the diagnosis of a rape-related paraphilia is so empty of scientific pedigree or so near-universal in its rejection by the mental health profession that civil commitment cannot be upheld as constitutional when this diagnosis serves as a predicate." Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

A. THE SEVENTH CIRCUIT FAILED TO IDENTIFY OR APPLY EVEN A *DE MINIMIS* DUE PROCESS STANDARD TO DETERMINE THE RELIABILITY OF THE PSYCHIATRIC DIAGNOSES UPON WHICH MR. MCGEE'S LOSS OF LIBERTY IS BASED

The court of appeals below effectively held that even psychiatric diagnoses that *lack* general acceptance as legitimate and empirically reliable diagnoses in the field of psychiatry may serve as the basis for SVP confinement, without satisfying any meaningful minimal due process standard of reliability. *See* Pet. App. 46a (fact-finder may consider even diagnoses "not accepted or . . . explicitly rejected by the DSM or other authoritative sources."). That decision reflects the need for guidance from this Court.

1. A review of this Court's prior decisions shows that they do not identify the minimal level of reliability required by due process when a diagnosis lacking general psychiatric acceptance is relied upon for indefinite SVP commitment.

In *Foucha v. Louisiana*, this Court held that substantive due process permits indefinite civil confinement only when there is clear and convincing proof that the person is both "mentally ill and dangerous." 504 U.S. 71, 80 (1992). In *Hendricks* this Court clarified the *Foucha* "mental illness" requirement, holding that for the purposes of SVP confinement, legal concepts like "mental disorder" or

"mental abnormality" do not need to mirror medical terminology as long as they "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. That holding rested on two critical facts: first, that Hendricks had been diagnosed with "a condition that the psychiatric profession itself classifies as a serious mental disorder"; and second, that Hendricks admitted that he had a "lack of volitional control" as a result of that disorder. *Id.* at 360, *citing* 1 American Psychiatric Association, *Treatments of Psychiatric Disorders* 617-633 (1989) *and* Abel & Rouleau, *Male Sex Offenders, in Handbook of Outpatient Treatment of Adults* 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990).

Finally, in *Crane*, this Court held that the finding of "volitional" impairment required by *Hendricks* need not necessarily entail a "complete lack of control." 534 U.S. at 411. Instead, due process requires "proof of serious difficulty in controlling behavior . . . [which], when viewed in light of such features of the case *as the nature of the psychiatric diagnosis*, and the *severity of the mental abnormality itself*, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* at 413 (emphasis added). Although *Crane* further suggested that the psychiatric diagnosis need not distinguish among "volitional, emotional, and cognitive impairments," *id.* at 415, the Court was careful to confirm that Crane's alleged disorders

involved recognized DSM diagnoses. *Id.* at 411, *citing DSM.*

Thus, the findings of mental disorder sufficient to support indefinite SVP confinement in *Hendricks* and *Crane* were predicated on psychiatric "disorders" (whether emotional or volitional, sexual or personality-related) that the medical profession recognizes as valid and empirically reliable diagnoses. To be sure, dicta in those decisions also emphasized the need for legislatures and courts to have "leeway" to develop legal standards for SVP commitment in the face of ongoing developments and debates in the psychiatric profession, and eschewed "bright line rules" in favor of a "contextual" approach. *Crane*, 534 U.S. at 413-14; *Hendricks*, 521 U.S. at 359. But under the facts of those cases, this Court had no occasion to determine the level of reliability required by due process in cases not involving a professionally recognized diagnosis.

2. In the proceedings below, Mr. McGee provided significant authority showing that his civil commitment as an SVP was founded on purported "not otherwise specified" diagnoses that the psychiatric profession has never recognized as valid, empirically reliable evidence of serious mental impairment, and, to the contrary, has repeatedly called into doubt. *See* Pet. App. 54a, n.14. As one authority explained, "[F]orensic [SVP] examiners start with diagnoses with poor validity and poor reliability, and they then decrease the diagnostic validity and reliability even further by using NOS categories and by dispensing with *DSM*-required criteria on the grounds that such criteria are mere

'guidelines.'" Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. Sex. Offender Civ. Commitment 17, 72 (2005).[5]

In its opinion, the court of appeals acknowledged that Mr. McGee's diagnoses were the subject of "conflicting professional views," and that those diagnoses were at "variance" with established diagnostic criteria and faced "persuasive" objections from the psychiatric profession. Pet. App. 51a, 55a, 57a. Accordingly, the court of appeals was unable to ascertain whether the diagnoses relied upon in Mr. McGee's SVP trial would be recognized by the psychiatric profession as empirically reliable evidence of serious mental impairment, as were the diagnoses in *Hendricks* and *Crane*. Pet. App. 46a (noting merely that state's diagnosis need not be found "within the four corners of the DSM"). Nor did the court of appeals meaningfully determine whether that lack of reliability violated due process. *See* Pet.

---

[5] *See also* Robert A. Prentky *et al.*, *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 Psychol. Pub. Pol'y & L. 357, 369 (2006) (nonstandard NOS diagnoses used in forensic examinations "have no known empirical support"); Holly A. Miller *et al.*, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 Law & Hum. Behav. 29, 32 (2005) (NOS category frequently used by forensic examiners is "so amorphous that no research has ever established its validity"); Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 Law & Hum. Behav. 357, 364 (2004) (empirical study showing "poor" reliability ratings for NOS diagnoses in forensic examinations); Richard Wollert *Poor Diagnostic Reliability, the Null-Bayes Logic Model, and their Implications for Sexually Violent Predator Evaluations*, 13 Psychol. Pub. Pol'y & L. 167, 185 (2007) (confirming Levenson study results).

App. 52a (stating generally that fact finder should exercise "prudence and caution" when making legal determination based on NOS diagnoses). Instead, the court of appeals accommodated that lack of reliability by concluding that due process is satisfied as long as those purported diagnoses are not demonstrably "empty," "patently lacking" or "near-universal[ly]" rejected. Pet. App. 51a, 57a.

The court of appeals' "standard" effectively shifts the burden of proof in SVP commitment trials. Instead of requiring the State to prove that its diagnoses are legitimate, empirically reliable evidence of the alleged mental impairments, based on the DSM or comparable medical authority, the accused is forced to *disprove* the legitimacy of a purportedly DSM-derived, non-specific or "invented" diagnosis. Worse yet, the accused must do so without even being allowed to invoke the DSM as a binding or bottom-line authority. *See* Pet. App. 45a (respondents cannot use DSM to answer "ultimate legal questions").

3. The due process "standard" applied by the court of appeals in Mr. McGee's case is irreconcilable with the reliability of the diagnoses in *Hendricks* and *Crane*. Both of those precedents involved professionally recognized, medically valid and reliable diagnoses. Under the "standard" applied below, the State may civilly confine convicted criminals indefinitely without having to provide valid or reliable evidence of a serious mental disorder. The absence of a meaningful standard for determining diagnostic reliability effectively imposes no medical standard at all, and thus renders SVP

commitment indistinguishable from mere "confinements for dangerousness." *Foucha*, 504 U.S. at 83.

Therefore, this Court should establish a minimum due process standard for the reliability of the diagnoses upon which courts rely in SVP civil commitments, and remand Mr. McGee's case for a determination whether that due process standard has been satisfied.

B. THE QUESTION PRESENTED IS CENTRAL AND RECURRING IN THE ADJUDICATION OF SEX OFFENDER CIVIL COMMITMENTS, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT.

1. As the court of appeals recognized, resolution of the question presented turns on "the present state of Supreme Court precedent" on the issue of the due process requirements for the evidence of mental disorder in SVP commitment proceedings. Pet. App. 57a. An unintended consequence of the dicta about medical terminology in *Crane* and *Hendricks* has been that courts have reached inconsistent interpretations of the minimum level of psychiatric proof required for SVP commitments. *See* Pet. App. 37a (noting "non-uniform" interpretations of *Crane* standard). Some courts have recognized the need for more stringent proof that purportedly DSM-based diagnoses proffered in support of SVP commitment, in particular the NOS diagnoses, are indeed scientifically legitimate and empirically reliable

causes of "serious" behavioral impairment.[6] However, this case presents the issue underlying those challenges in its most basic form: namely, does due process require proof that a diagnosis meets some level of reliability, or does it permit all but the most patently invalid diagnoses?

2. This case is the ideal vehicle to resolve the issue of the minimum due process standard of reliability for the diagnosis necessary to justify civil commitment because Mr. McGee's SVP commitment was predicated on two controversial "not otherwise specified" diagnoses widely used in SVP trials: "personality disorder NOS" (as a lesser substitute for a diagnosis of antisocial personality disorder) and "paraphilia NOS" (for a purported rape-related disorder). Those diagnoses remain the subject of considerable controversy in the psychiatric

---

[6] *See, e.g., Graham*, 2010 WL 457445, at *12-15 (government failed to prove that diagnosis of "paraphilia not otherwise specified" met standard of "serious" disorder for SVP commitment, where criteria were also too general to distinguish purported subgroup of those with the disorder from "every recidivist rapist"); *United States v. Shields*, No. 07-12056-PBS, 2008 WL 544940, at *2 (D.Mass. Feb. 26, 2008) (government failed to prove that non-DSM diagnosis was "generally accepted as a mental disorder by professionals who assess sexually violent offenders" and failed to provide evidence to show "how the psychiatric community determines what may properly be included within the Paraphilia NOS category"); *United States v. Abregana*, 574 F. Supp.2d 1145, 1154 (D.Haw. 2008) (government failed to prove that "paraphilia not otherwise specified" met statutory standard of "serious" mental disorder). *See also Lawrence, supra*, 689 S.E.2d at 753 (reversing SVP commitment predicated on diagnoses of "personality disorder not otherwise specified" and "paraphilia not otherwise specified" that relied on respondent's criminal record and unproved allegations of sexual misconduct).

profession precisely as to their suitability and reliability for forensic use in SVP commitment proceedings, given their lack of empirical verification.[7] Resolution of Mr. McGee's challenge will therefore determine whether, or under what circumstances, those diagnoses meet the level of reliability for the diagnostic proof necessary to sustain a legal finding of "mental disorder" justifying indefinite civil confinement.

3. Furthermore, the facts of Mr. McGee's case underscore the questionable reliability of the psychiatric evidence currently used to support SVP commitment. Mr. McGee was "diagnosed" and indefinitely confined as an SVP on the basis of a single conviction of sexual assault and two accusations the courts have recognized as "problematic." Pet. App. 2a-5a. There is no allegation or suggestion anywhere in Mr. McGee's record of any broader history or pattern of sexual crimes or psychotic behavior. Pet. App. 2a-5a. Quite simply, Mr. McGee's own history shows how little it takes, under the current standard, to justify potentially lifelong loss of liberty on the basis of a purported "mental disorder."

Thus, the Court should grant Mr. McGee's petition because the question whether due process requires a reliable psychiatric diagnosis to support indefinite civil detention, or only excludes from

---

[7] *See generally*, Zander, *Inventing Diagnosis*, *supra* note 1; Prentky, *Muddy Diagnostic Waters*, *supra* note 1; Allen Frances *et al.*, *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. Am. Acad. Psychiatry & L. 375 (2008).

consideration diagnoses that are "empty," "patently lacking" or "near-universal[ly]" rejected, is an important and recurring one. This case presents an ideal vehicle for resolving that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerold S. Solovy
Counsel of Record
David J. Bradford
Eric J. Schwab
Jenner & Block LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 222-9350
jsolovy@jenner.com

Attorneys for Petitioner,
Michael L. McGee

INDEX

Appendix A – McGee v. Bartow,
593 F.3d 556 (7th Cir. 2010) 1a-58a

Appendix B – McGee v. Bartow
No. 06-C-1151, Decision and Order
(August 23, 2007) 59a-65a

Appendix C – McGee v. Bartow
No. 06-C-1151, Memorandum Decision
and Order Denying Motion to Dismiss
(April 3, 2007) 66a-77a

Appendix D – Wis. Stat. Ann.
Ch. 980 ..... 78a

Appendix E – United States Constitution,
14th Amendment 79a

Appendix A

United States Court of Appeals,
Seventh Circuit.

Michael L. McGEE,

Petitioner-Appellant,
v.

Case No. 07-3278

Byran BARTOW,

Respondent-Appellee.

Argued Dec. 5, 2008.
Decided Jan. 27, 2010.

Before RIPPLE, KANNE and TINDER, Circuit Judges.

RIPPLE, Circuit Judge.

In 2003, Michael McGee was ordered to be civilly committed as a "sexually violent person" ("SVP") pursuant to Chapter 980 of the Wisconsin Statutes. After exhausting his state appeals and petitioning unsuccessfully for post-commitment relief in the state courts, he filed a petition for habeas corpus in the United States District Court for the Eastern District of Wisconsin, contending that his continued state custody deprives him of his right to due process

of law. The district court denied the writ but issued a certificate of appealability on the question. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

BACKGROUND

A.

In 1987, Mr. McGee entered an apartment that he believed was vacant, apparently intending to rob it. Instead, he found a woman and her child asleep on the sofa. Mr. McGee then ordered the woman upstairs, where he raped her. Following the rape, Mr. McGee stayed in the victim's home until the next morning when she convinced him that she had to take her son to school, which he allowed her to do. As he accompanied his victim down the street he repeatedly apologized to her. After ensuring that her son had reached his school safely, the victim was able to escape to her mother's home. The victim identified Mr. McGee in a photographic line-up, and he later was convicted of burglary and sexual assault. He was sentenced to eight years' imprisonment and six years' probation.

In 1992, after serving five years of his sentence, Mr. McGee was released on parole. He subsequently was accused of two separate, additional incidents of sexual assault, one involving a woman and another involving an adolescent male, neither of which

resulted in a conviction. His parole, however, was revoked, and he was returned to the physical custody of the Wisconsin authorities.

B.

In 1995, before his mandatory release, the State of Wisconsin filed a petition seeking to have Mr. McGee declared a SVP under Chapter 980. He was civilly committed following a jury trial. This first civil commitment determination was reversed after a state court concluded that Mr. McGee's trial counsel in the commitment proceeding was ineffective for failing to discover evidence that undermined the credibility of the accusers in the 1992 incidents. Accordingly, in 1999, he was released from civil commitment.

In 2000, Mr. McGee's parole again was revoked after he tested positive for marijuana and had contact with the alleged victim of one of the 1992 assaults. Before his scheduled release, the State of Wisconsin again initiated proceedings to have Mr. McGee committed as a SVP.

C.

The proceedings resulting in Mr. McGee's second civil commitment form the basis of his current petition for habeas relief. In those Chapter 980 proceedings, Mr. McGee represented himself at a bench trial.

The state presented two experts. First, the state called Dr. Caton Roberts, a psychologist employed by the Department of Corrections and a university lecturer in psychology. Dr. Roberts testified that his evaluation was based upon fifteen hours of review of Mr. McGee's record; specifically relevant were Mr. McGee's various rule violations, difficulty staying out of trouble, physical altercations, criminal convictions and "pervasive impulsivity." R.16, Ex. 83 at 118-21. Based upon his review, Dr. Roberts testified that, in his opinion, Mr. McGee suffered from "a personality disorder not otherwise specified ["NOS"] with antisocial features." *Id.* at 119. Dr. Roberts believed that his diagnosis fit within the criteria listed in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") published by the American Psychiatric Association ("APA").[1] *Id.* at 119-20. He acknowledged that he could not diagnose Mr. McGee with Antisocial Personality Disorder ("APD") as described in the DSM because the record was devoid of any evidence of personality disorders before Mr. McGee reached the age of 15, an explicit requirement in the DSM for an APD diagnosis. *Id.* at 120-21. Dr. Roberts further testified that he had reviewed other proposed diagnoses in Mr. McGee's file by other examiners, but did not believe that they were supported in the record. Dr. Roberts specifically

---

[1] All references to the DSM refer to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, published by the American Psychiatric Association in 2000. In the profession, the text is sometimes referred to as the DSM-IV-TR. For the sake of simplicity, we use the shorthand "DSM."

stated that he did not believe that the record supported a diagnosis of "a paraphili[c] disorder not otherwise specified." *Id.* at 120. In addition to his clinical diagnoses, Dr. Roberts testified about the use of two actuarial tools that support, in his judgment, a conclusion that Mr. McGee "was substantially probable to reoffend sexually if not detained and treated." *Id.* at 124.

The state also called Dr. Cynthia Marsh. Dr. Marsh testified that she was also a state-employed counselor and a university lecturer; she holds a Ph.D. in "urban education specializing in counseling psychology." *Id.*, Ex. 84 at 19. Dr. Marsh testified that she had diagnosed Mr. McGee with two mental illnesses that qualified him to be committed as a SVP: paraphilia NOS and a personality disorder NOS with antisocial features. *Id.* at 34-35. She stated that the "key characteristic" for a diagnosis of personality disorder was "disregard for and violation of the rights of others." *Id.* at 35. She acknowledged that she had based her diagnosis on Mr. McGee's history, including the sexual assault charges from 1992 that had proved problematic in his first commitment proceeding.

Dr. Marsh also testified about the results of three actuarial tools. She stated that subjects with scores similar to Mr. McGee's in each of these instruments reoffended at rates of between forty-eight and fifty-four percent over a six- to fifteen-year period following release. Her conclusion, based on her diagnoses and the actuarial tools, was that Mr.

McGee was "much more likely than not to reoffend in a sexually violent manner." *Id.* at 39. Dr. Marsh was not subject to cross-examination because Mr. McGee had refused to participate in the second day of his commitment proceeding.

Based on the testimony of Drs. Roberts and Marsh, the state court ordered Mr. McGee committed as a SVP pursuant to Wis. Stat. § 980.06.

D.

Following his commitment, Mr. McGee took an unsuccessful direct appeal and then petitioned, again unsuccessfully, for state collateral relief. Mr. McGee next filed a petition for habeas corpus in the United States District Court for the Eastern District of Wisconsin. The district court dismissed Mr. McGee's petition, but granted a certificate of appealability under 28 U.S.C. § 2253(c)(2). The substance of the state and federal proceedings are explored in significant detail below.

II

PROCEDURAL DEFAULT

As briefed to this court, Mr. McGee raises two challenges to his commitment. The first is whether confinement as a SVP on the basis of his diagnoses, which he claims lack a reasonable scientific foundation, violates due process of law. The second is whether, under the Supreme Court's decision in

Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), committing courts must ascertain whether the nature and specificity of a particular person's mental impairment is of a level which justifies civil confinement. In his view, this latter challenge focuses on whether the Wisconsin courts have failed to implement Crane properly because the statute does not require that commitment is supported by a finding of a "special and serious lack of ability to control behavior." *Id.* at 413, 122 S.Ct. 867.

Before the district court, the State contended that all of Mr. McGee's claims were procedurally defaulted. Before this court, the State has abandoned a procedural challenge to the first issue Mr. McGee presents. As to the second issue, however, the State now contends that Mr. McGee failed to present it to the state courts, resulting in a procedural default that would bar our consideration of the issue. It also argues, in the alternative, that even if the second issue regarding the application of *Crane* was properly before the state courts, Mr. McGee forfeited the argument in his federal habeas proceeding by failing to present it to the district court.

To inform our analysis of the procedural status of these claims, we begin with a detailed examination of the parties' positions at all stages of Mr. McGee's challenge to his commitment.

A.

Mr. McGee appeared pro se for most of his commitment proceedings, including his trial, in the Wisconsin Circuit Court for Racine County. After he was ordered committed, he filed, pro se, a motion for relief from the judgment with the committing court. In that motion, he presented a variety of issues, one of which was identified by the court as a claim "that the diagnosis, essentially one of a personality trait [sic] is not sufficient for the commitment." R.85 at 11. At his hearing on the motion, the nature of Mr. McGee's contentions was somewhat clarified by his repeated interruptions of counsel for the State to inquire what "not otherwise specified" meant as related to his diagnosis. *Id.* at 14. Mr. McGee called the diagnosis "bogus," *Id.* at 15, and insisted that the State "basically made [the diagnosis] up," *Id.* at 17. The circuit court denied the motion for relief from judgment.

Mr. McGee was represented by counsel on appeal. Prior to the appointment of counsel, he filed his own notice of appeal, in which he cited three bases to challenge the commitment. Specifically, he contended: (1) that his commitment was based on insufficient evidence that his "social history manifests the scientific diagnostic criteria of any mental and/or personality disorder"; (2) that confinement on the basis of his diagnosis "violates the substantive component of the Due Process Clause"; and (3) that the State's use of a personality disorder NOS diagnosis as the basis for confinement violated state law and due process "inasmuch [as the] condition [was] literally made up by" state

psychologists. R.1, Attach. 6 at 1.

In counsel's brief to the appellate court, however, the challenge articulated was instead that Mr. McGee's burglary conviction could not serve as the predicate offense for a Chapter 980 proceeding because it was not a "sexually motivated" offense. R.10, Ex. B at 6. The Court of Appeals of Wisconsin affirmed. It does not appear, from the record before us, that Mr. McGee petitioned for discretionary review to the Supreme Court of Wisconsin.

B.

Following the Court of Appeals' affirmance of his commitment, Mr. McGee, again pro se, filed a habeas petition in the Court of Appeals of Wisconsin under *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992),[2] challenging his commitment with a claim of ineffective assistance of appellate counsel.[3] Although

---

[2] *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992), involved a collateral attack on a criminal conviction based on a claim of ineffective assistance of appellate counsel. The Supreme Court of Wisconsin held in *Knight* that the appropriate procedure for such an attack was a habeas corpus proceeding filed in the court that considered the direct appeal. *Id.* at 544-45. Such proceedings have come to be known in Wisconsin as "*Knight* petitions." See, e.g., *State ex rel. Panama v. Hepp*, 314 Wis.2d 112, 758 N.W.2d 806, 808 (2008) (discussing the applicability of *Knight* petitions).

[3] Chapter 980 proceedings include a statutory right to counsel. *See* Wis. Stat. § 980.03(2)(a). The Supreme Court of Wisconsin has held that where a statutory right to counsel exists, it includes the right to effective assistance of counsel. *A.S. v. State*, 168 Wis.2d 995, 485 N.W.2d 52, 54 (1992). Wisconsin

it is not a perfectly clear or well-organized brief, it does appear to raise and attempt to develop several issues relevant to the present proceeding. Mr. McGee's overarching contention to the Wisconsin court was that his appellate counsel was ineffective for failing to raise various arguments related to his mental condition in the direct appeal. At trial, the State's experts had discussed Mr. McGee's scores on various actuarial tools and interpreted his results to demonstrate his probability of reoffending. In his *Knight* petition, Mr. McGee claimed that his scores, and thus his risk of recidivism, did not actually bear on the relevant question of whether he had a "mental condition" upon which civil confinement can be imposed consistent with due process. R.1, Attach. 3 at 2. He further contended that his confinement was based on a "nondemonstratable [sic] personality disorder," that it was a "tautology of an antisocial per[so]nality disorder," and that his diagnosis, by definition, "does not cause any inability to control behavior." *Id.* at 3. He also contended that the State's experts did not demonstrate "that mere features of an antisocial per[so]nality disorder can be diagnosed as a disorder under the category not otherwise specified in the (DSM)." *Id.* at 4. His NOS diagnosis, therefore, was not of an "actual mental condition" that could support confinement. *Id.* Finally, he contended that his diagnosis was "literally made up"

---

applies the familiar deficiency and prejudice test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for ineffective assistance claims based on a statutory right to counsel. *See State ex rel. Schmelzer v. Murphy*, 201 Wis.2d 246, 548 N.W.2d 45, 48 (1996).

and "only exist[s] in the minds of the chapter 980 evaluation team but nowhere else." *Id.* at 6.

The Court of Appeals of Wisconsin denied Mr. McGee's petition. After recounting the procedural history and confirming that a *Knight* petition was the proper vehicle for his challenges, the court turned to Mr. McGee's substantive contentions. Noting that the brief was "difficult to understand," the court construed the single issue that it could discern as a claim that appellate counsel was ineffective for failing to challenge the use of actuarial tools as part of the diagnostic model. R.10, Ex. E at 4. It held that Mr. McGee's petition was "an attempt to retry" his commitment and noted that its earlier order upholding commitment was based on its assessment of his intent in committing the burglary, "not the experts' testimony." *Id.* The court continued without further explanation, that, "[t]herefore, even if appellate counsel had made such arguments, they would not have been successful." *Id.* The petition was denied "on the grounds that McGee was not prejudiced by his appellate counsel's performance." *Id.* (*citing Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Mr. McGee, again proceeding pro se, next petitioned the Supreme Court of Wisconsin for discretionary review of his *Knight* petition. In his petition, he again raised appellate counsel's ineffectiveness for failing to challenge the sufficiency of his diagnoses. He also again contended that even if APD itself had been proved, it did not cause any inability to control

behavior, sexual or otherwise. R.1, Attach. 1 at 1. The Supreme Court of Wisconsin denied review.

C.

Mr. McGee, again proceeding pro se, filed a federal habeas petition under 28 U.S.C. § 2254. We shall endeavor to give his petition and his briefs the fairest reading with an eye toward the issues he wishes to present in the present appeal. *See Baldwin v. Reese,* 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (identifying the petition and brief as documents a court should reference for determining whether the fair presentment requirement has been met).

Mr. McGee began by contending that he "cannot be clinically diagnosed with anything." R.8 at 2 (emphasis in original). Mr. McGee's briefing traced the history of his challenges to his commitment and repeatedly stated that he raised an issue regarding the application of the Supreme Court's decision in *Kansas v. Crane* and whether his "disorder" caused the required inability to control behavior. *Id.* at 4; *see also Id.* at 12 (stating that a personality disorder diagnosis "without more" does not satisfy "the requirement of a mental condition that causes a lack of control"). He further claimed that the state courts had ignored the issue. *Id.*

Mr. McGee also contended, at some length, that his NOS diagnoses were lacking in validity and not accepted within the psychiatric community. He noted

the variance between the diagnosis accepted in Wisconsin and the diagnostic criteria of related, generally accepted disorders as identified by the DSM.[4] *Id.* at 3-4; *see also Id.* at 12-13 (listing the DSM criteria for APD and stating that it is "nothing but another way of saying 'Criminal'"); R.11 at 4 (quoting Justice Kennedy's concurring opinion in *Kansas v. Hendricks,* 521 U.S. 346, 372, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), for the proposition that Hendricks's disorder, pedophilia, "is at least described in the DSM[ ]" (emphasis added by petitioner)). In further briefing, he reiterated that the personality disorder NOS diagnosis was, in his view, "not a real diagnosis." R.11 at 4 (Response to the State's Motion to Dismiss).

> Although Mr. McGee sometimes uses the term "antisocial personality" to describe his diagnosis, it is clear that he is drawing a distinction between the actual APD diagnosis and the NOS diagnosis upon which he was committed. *See, e.g.*, R.11 at 3 ("[T]his petitioner does dispute whether antisocial features alone is a legitimate diagnosis." (emphasis in original)).

---

[4] Although Mr. McGee sometimes uses the term "antisocial personality" to describe his diagnosis, it is clear that he is drawing a distinction between the actual APD diagnosis and the NOS diagnosis upon which he was committed. See, e.g., R.11 at 3 ("[T]his petitioner does dispute whether antisocial features alone is a legitimate diagnosis." (emphasis in original)).

The district court, exercising its obligations under Rule 4 of the Rules Governing Section 2254 Cases, reviewed the petition alone and concluded that summary dismissal was not appropriate. Accordingly, it ordered the State to file an answer to the claim that Mr. McGee's "incarceration under Chapter 980 violates the Constitution because it is based on a diagnosis of personality disorder that does not correspond to the requirements of due process." R.4 at 1 (*citing Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002)).

The State of Wisconsin filed a motion to dismiss for procedural default, and Mr. McGee responded. The State's position was that Mr. McGee had failed to raise a due process challenge[5] to his commitment through one complete round of state court review. R.10 at 3-4 (*citing O'Sullivan v. Boerckel*, 526 U.S. 838, 854, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (Stevens, J., dissenting)). The State further argued that, although a claim for ineffective assistance of counsel was preserved through the *Knight* petition proceedings, counsel was not ineffective, and therefore Mr. McGee could not, by way of a right to counsel claim, establish cause and prejudice for the

---

[5] The State acknowledges that Mr. McGee took a direct appeal and filed a subsequent *Knight* petition. R.10 at 2. In its memorandum in support of the motion to dismiss, the State vaguely refers to Mr. McGee's "brief in the Wisconsin Court of Appeals," *Id.* at 4, as though there were only one brief. We take the State to be referring to Mr. McGee's direct appeal in which he was assisted by counsel, because the State notes later that "no petition for review was filed," *Id.*, a fact only true with respect to the direct appeal.

default of his due process claim.

In ruling on the motion, the district court carefully reviewed the history of Mr. McGee's commitment challenges and concluded that the due process claims had been presented fairly to the state courts. The district court acknowledged that Mr. McGee had failed to present the due process arguments on direct appeal, but noted that this was "hardly McGee's fault." R.12 at 8. The court construed Mr. McGee's *Knight* petition alleging ineffective assistance as raising a claim that counsel was ineffective for failing to contend

> that [his] diagnosis is essentially a "bogus disorder" that was invented by state psychologists to justify his continued confinement after he completed his sentence.... McGee also argued that an antisocial personality disorder, by definition, does not cause inability to control one's behavior. Thus, he claimed that his involuntary commitment on the basis of such a diagnosis violated his Fourteenth Amendment right to due process of law as set forth by the United [States] Supreme Court in *Kansas v. Crane* ....

Id. at 6-7 (emphasis added) (citations omitted). In light of this content in his *Knight* petition, the district court concluded that the State had a fair opportunity "to consider the gist of [ ] McGee's claim,

which was that due process was violated because of the state's reliance upon a diagnosis not recognized in the field of mental health as a basis to civilly confine an individual indefinitely." *Id.* at 8.[6]

After briefing on the merits, the contentions of which are outlined above, the court denied the writ. Because the state courts had not adjudicated Mr. McGee's claim on the merits, the district court noted that it was required to "dispose of the matter as law and justice require." R.26 at 2 (*citing* 28 U.S.C. § 2243).

The court then stated that, in its view, Mr. "McGee's argument is quite narrow": that his particular diagnoses do not "live up to the Supreme Court's requirements for due process." R.26 at 2-3. The court, relying on its interpretation of *Crane*, ruled that "just as there are no magic words, there are no magic diagnoses.... [F]or due process purposes, it matters little whether the disorder is described as 'antisocial personality disorder' or 'personality disorder with antisocial features.'" *Id.* at 3. The court then reviewed the record and concluded that Mr. McGee's confinement was not based solely on a "personality disorder," but on a substantial probability of

---

[6] The district court, in its subsequent order on the merits, acknowledged that the claim of ineffective assistance of counsel for failure to raise the due process issues was the claim actually exhausted. R.26 at 2 n. 2. The due process challenges were only presented to the state courts as embedded, not independent claims. The district court continued, "[b]ecause I find that the claim ultimately fails, it follows that his appellate counsel was not ineffective for failing to raise it in McGee's appeal." *Id.*

reoffense, appropriately evaluated (contrary to Mr. McGee's contentions as interpreted by the district court) by the use of actuarial risk assessment models. The district court held that Mr. McGee properly had been "found to be a SVP based on testimony that he had a mental disorder that caused him to have serious difficulty controlling his behavior." *Id.* at 5.

D.

Mr. McGee, still pro se, petitioned the court for a certificate of appealability. In his petition, he identified four issues. The first two relate to his claim that a diagnosis of a personality disorder NOS is an invalid and unrecognized creation of the Wisconsin Chapter 980 team. The third claims that the district court sidestepped the diagnostic validity issue when it found that Mr. McGee was not confined "solely" on the basis of his diagnosis, but on a finding of a substantial probability of reoffense. R.26 at 4-5. Finally, Mr. McGee's fourth claim references the opinion of the district court in a related case, brought by Bruce Brown. Specifically, Mr. McGee quotes that court on the subject of Mr. Brown's paraphilia NOS diagnosis and its conclusion that a petitioner may be able to show that it does not distinguish between the dangerous but typical recidivist, as required by Supreme Court precedent. Mr. McGee seems to contend that his diagnoses, particularly the personality disorder, are infirm for the same reason.

The district court issued a certificate of appealability

on the "single issue" raised in Mr. McGee's habeas petition: "that his diagnosis for personality disorder does not qualify under the Supreme Court's due process requirements for involuntary incarceration." R.34 at 1. The district court continued, "[i]n essence, he believes the State of Wisconsin manufactured a bogus diagnosis, unrecognized out of the state's own corridors, in order to keep him locked up." *Id.*

E.

Mr. McGee briefs his due process challenge to his commitment as comprising two elements, first, that his diagnoses are medically invalid and unrecognized, and second, that Wisconsin has failed to implement *Crane* by requiring a finding that the nature and severity of a particular diagnosis cause a "special and serious lack of ability to control behavior." 534 U.S. at 413, 122 S.Ct. 867. The State had claimed, in the district court, that Mr. McGee's claims were procedurally defaulted. The State now makes that claim only with respect to the second element of Mr. McGee's due process challenge, that is, with respect to the claim that Wisconsin procedures do not satisfy *Crane*.[7] The State further argues that this second element is not encompassed within the certificate of appealability and was

[7] Document1zzF00772021221226At oral argument, the attorney for the State told us that while he did not "agree" with the district court regarding its holding on default, it was not so far off the mark, in his view, that the State would argue it was erroneous. The State's argument, therefore, is that the district court's ruling (and Mr. McGee's presentations in that court) only encompassed the first element of the current challenge.

forfeited by Mr. McGee in the district court.

If the State is correct that Mr. McGee did not present his claims in state court, the consequence is significant. Failure to present fairly claims through one complete round of state court review works a procedural default, barring a federal court from review of the substance of a habeas petition, unless a petitioner can establish cause and prejudice to excuse the default or can establish that failure to consider his claims will result in a fundamental miscarriage of justice. *See Johnson v. Hulett*, 574 F.3d 428, 431 (7th Cir.2009).

Upon review of the history of the proceedings, we cannot agree with the State regarding the matters properly before this court. We are mindful of our obligation to construe liberally the submissions of Mr. McGee when he proceeded pro se. *See Wyatt v. United States*, 574 F.3d 455, 459 (7th Cir.2009) (noting that it is appropriate to construe district court habeas filings by pro se petitioners liberally); *Osagiede v. United States*, 543 F.3d 399, 405 (7th Cir.2008) (construing liberally a request for a certificate of appealability); *Lewis v. Sternes*, 390 F.3d 1019, 1027 (7th Cir.2004) (noting that it was proper to make a "generous interpretation" of a habeas petitioner's state court filings in considering default). Mr. McGee, who has not completed high school, has navigated the bulk of his commitment proceedings, his state collateral review, and, until his arrival at this court, his federal habeas proceeding without the assistance of counsel. The singular prior

stage at which he accepted the assistance of counsel was his state direct appeal. Prior to counsel's appointment on direct appeal, Mr. McGee indicated an intent to raise the very issues before us today. Counsel chose not to pursue those issues, and, at his next opportunity, Mr. McGee argued that counsel's performance rose to the level of ineffective assistance because of that choice. While his claims were not presented artfully, the "basic rationale" of Mr. McGee's due process challenge was "readily discernible" in the state courts and in the district court. *Perruquet v. Briley*, 390 F.3d 505, 512 (7th Cir.2004).

Mr. McGee never stated, as directly as he does in his brief to this court, that as a consequence of *Crane*, the Chapter 980 process was infirm for failing to require a separate factual finding of a special and serious inability to control behavior. Instead, Mr. McGee simply and repeatedly stated that, with respect to his own diagnoses, the State did not and could not demonstrate an inability to control behavior. *See, e.g.*, R.1, Attach. 3 at 2, 3 (*Knight* petition); R.1, Attach. 1 at 1 (Petition for Review of *Knight* petition). We also note that the district court's summation of the state court proceedings recognized that the due process issue presented challenges to the validity of the diagnoses themselves and their sufficiency under Crane's impairment standard. *See* R.12 at 6-7 (characterizing the challenge in the state court as whether he was diagnosed with "a 'bogus disorder' that .... by definition, does not cause inability to control one's

behavior .... [such] that his involuntary commitment ... violated his Fourteenth Amendment right to due process of law as set forth by the United [States] Supreme Court in *Kansas v. Crane*").

The district court was correct. The two arguments Mr. McGee makes are part of the same basic due process challenge, and both elements were part of his submissions in both the state court in his *Knight* proceeding and the district court. *See Sweeney v. Carter*, 361 F.3d 327, 333 (7th Cir.2004) (noting that "a mere variation in legal theory" does not work a procedural default and that "a petitioner may reformulate her claims so long as the substance of the claim remains the same") (internal quotation marks omitted); *see also United States ex rel. Nance v. Fairman*, 707 F.2d 936, 940 (7th Cir.1983) (drawing a distinction between the effect of a "mere variation" in legal theory and a "different legal claim" for procedural default purposes). If we were to find the second element of his challenge lacking in any respect, it would be that there is no direct reference to it in the request for a certificate of appealability; but, as the State acknowledges, this is not a fatal failing because our court would be at liberty to consider his briefing of the issue as a request for expansion of the certificate.[8] Because we

[8] Although the State has told us that it has not briefed the issue, Appellee's Br. 2-3, and will do so only upon further order of the court, its brief actually does address this issue in substance. See *Id.* at 17-22. With the position of the State so before us, we have determined that further briefing of this issue is unnecessary.

perceive the second element to be part of the same due process challenge, however, we see no need to expand the certificate, which itself only purported to distill Mr. McGee's claim to its "essence," not present it in detailed particulars. R.34 at 1.

The State's reliance on the opinions of the district court to justify limiting the issues presented in the case is misplaced. The district court attempted to give fair treatment to a muddled pro se pleading when it described, at various times, the gist or essence of Mr. McGee's submissions. We do not take those distillations to be attempts by the district court to narrow the issues before it rather than simple attempts to understand the presentation made to it. In any event, we are not limited to the district court's characterizations of the pleadings before it in considering the issue of forfeiture, just as the district court was not limited by the state court's characterizations of Mr. McGee's submissions when it considered the issue of default and concluded, contrary to the Court of Appeals of Wisconsin, that the due process challenge was fairly presented.

Upon review of the state court record, we view Mr. McGee's challenge regarding the *Crane* lack of control requirement to be on the same basic footing as his challenge to the validity of the diagnoses themselves. The operative facts and the guiding legal principles were presented to the state court. *See Sweeney*, 361 F.3d at 332.[9] The two issues, to the

---

[9] We acknowledge that the due process challenges were presented to the state courts as embedded within claims of

extent they are at all separable, are inextricably linked.

In sum, we conclude that Mr. McGee neither has procedurally defaulted nor forfeited his claims, and, therefore, we shall proceed to consideration on the merits.

III

CONTROLLING PRECEDENT

We begin with an examination of the Supreme Court's guidance on civil commitment. When the Court has examined the issue of civil commitment, it has reaffirmed the principle that, when strict procedural and substantive requirements are satisfied fully, commitment is a legitimate exercise of the authority of the state and consistent with "our understanding of ordered liberty." *Kansas v. Hendricks*, 521 U.S. 346, 357, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). When the process is lacking in either substance or procedure, however, the Court has not hesitated to reject a commitment as violative of due process.

---

ineffective assistance. We do not understand the State's argument, however, to be that the claims are defaulted because they were embedded. See *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir.2004). In any event, we have recognized that in some circumstances, where ineffective assistance claims are presented "as a means to reach" the embedded claims and those claims are the real substance of a petitioner's challenge, we will consider them fairly presented. See *Malone v. Walls*, 538 F.3d 744, 755 (7th Cir.2008).

A.

In *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), the Court examined the claim of a man who was detained indefinitely after having been found not guilty by reason of insanity. Specifically, a state statute provided for the automatic commitment of an insanity acquittee in a psychiatric hospital and permitted continued confinement until the acquittee himself could prove that he was no longer "dangerous," whether or not he was then mentally ill. *Id.* at 73, 112 S.Ct. 1780.

Foucha was found not guilty by reason of insanity on charges of burglary and discharge of a firearm and was committed to the custody of a psychiatric hospital. After four years of confinement, facility officials recommended Foucha for discharge. As required by statute, a hearing was held on his eligibility for release. The trial court appointed the experts who conducted his pretrial examination, and they concluded that Foucha was not then mentally ill. At the hearing, one of the doctors testified that, although Foucha was in "good shape" mentally, he had an antisocial personality and had been involved in altercations in the facility. *Id.* at 75, 112 S.Ct. 1780. As a result, the doctor was not "comfortable in certifying" that *Foucha* was no longer dangerous. *Id.* The trial court determined that Foucha had not carried the burden of proving that he was no longer dangerous and ordered his recommitment. The Louisiana Supreme Court affirmed.

Before the Supreme Court of the United States, consistent with the testimony of its expert, Louisiana did not contend that Foucha was "mentally ill" at the time that he sought release, *id.* at 78, 112 S.Ct. 1780; instead, it contended "that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely," *id.* at 82, 112 S.Ct. 1780. The Court disagreed:

> This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Id. at 82-83, 112 S.Ct. 1780. The Court ruled that the basis for continued detention of Foucha as an insanity acquittee had "disappeared," *id.* at 78, 112 S.Ct. 1780, and, therefore, his commitment no longer

satisfied the requirement of due process that "the nature of commitment bear some reasonable relation to the purpose for which the individual is committed," *id.* at 79, 112 S.Ct. 1780; *see also id.* at 88, 112 S.Ct. 1780 (O'Connor, J., concurring) ("I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent."). Accordingly, the Court ruled that Louisiana was not entitled to continue to confine Foucha absent "constitutionally adequate procedures to establish the grounds for his confinement." *Id.* at 79, 112 S.Ct. 1780. Because Louisiana had not shown "by clear and convincing evidence that [Foucha was] mentally ill and dangerous," consistent with existing precedent on civil commitment, his continued confinement was held to be constitutionally infirm. *Id.* at 80, 112 S.Ct. 1780.

B.

Several years later, in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the Court again examined the issue of civil confinement, this time in the context of sex offenders. Petitioner Hendricks had a long history of serious sexual abuse of children and had been diagnosed with pedophilia. He admitted an uncontrollable urge to molest children. He was committed pursuant to Kansas's Sexually Violent Predator Act, under which persons proven by clear and convincing evidence to have a "mental abnormality" that makes them "'likely to

engage in ... predatory acts of sexual violence'" were eligible for civil commitment. *Id.* at 352, 117 S.Ct. 2072 (quoting Kan. Stat. § 59-29a02(a)). On appeal, the Kansas Supreme Court reversed, holding the Kansas statute unconstitutional under Foucha. The term "mental abnormality," it ruled, did not meet the requirement of establishing a "mental illness" sufficient to support confinement. *Id.* at 356, 117 S.Ct. 2072.

The Supreme Court reversed. It concluded that substantive due process was satisfied by the statute's requirement of a "mental abnormality." *Id.* at 359, 117 S.Ct. 2072. The Court acknowledged, as it had in *Foucha*, that "freedom from physical restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 356, 117 S.Ct. 2072 (internal quotation marks and citation omitted). That liberty interest, the Court continued, "is not absolute," *id.* at 356, 117 S.Ct. 2072; in "certain narrow circumstances" states have "provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety," *id.* at 357, 117 S.Ct. 2072. The Court noted that it has "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id.* State statutes generally do not pass constitutional muster premised on a "finding of dangerousness, standing alone," but have been deemed constitutionally adequate when they have "coupled proof of dangerousness with the proof of

some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* at 358, 117 S.Ct. 2072. This additional factor, the Court held, "serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.*

The Court was careful to note that the term "mental illness," used in *Foucha* to identify the required "additional factor," was "devoid of any talismanic significance." *Id.* at 358-59, 117 S.Ct. 2072. Not only had the Court itself referred to this additional factor under many different names, but, perhaps more importantly, "'psychiatrists disagree widely and frequently on what constitutes mental illness.'" *Id.* (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)). The Court continued:

> [W]e have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community....

> Legal definitions ... which must "take into account such issues as individual responsibility ... and competency," need not mirror those advanced by the medical profession. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxiii, xxvii (4th ed.1994).

Id. (modification of quotation in original). In Hendricks's case, he had been diagnosed with a condition that "the psychiatric profession itself classifies as a serious mental disorder." *Id.* at 360, 117 S.Ct. 2072. His diagnosis, together with his admitted lack of volitional control and the predictions relating to his future dangerousness, "adequately distinguishe[d] Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* at 360, 117 S.Ct. 2072. The Court, therefore, upheld Hendricks's commitment and the Kansas statute's structure as consistent with due process.

Concurring in the judgment, Justice Kennedy agreed that the Kansas statute "is within [the] pattern and tradition of civil confinement." *Id.* at 372, 117 S.Ct. 2072 (Kennedy, J., concurring). He specifically noted that the condition at issue, pedophilia, "is at least described in the DSM[ ]." *Id.* Although fully joining in the Court's opinion, he concluded: "If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category

to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." *Id.* at 373, 117 S.Ct. 2072.

Justice Breyer, writing in dissent, agreed with the majority's conclusion that Hendricks's commitment did not violate due process. He first noted, in agreement with the majority, that "the Constitution gives States a degree of leeway" in establishing the necessary criteria for commitment. *Hendricks*, 521 U.S. at 375, 117 S.Ct. 2072 (Breyer, J., dissenting). Like Justice Kennedy, Justice Breyer also noted that Hendricks's disorder was a recognized disorder by the psychiatric community, listed in the DSM. Justice Breyer continued:

> I concede that professionals also debate whether or not this disorder should be called a mental "illness." But the very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds.

Id. (internal citations omitted). Moreover, the effect of the disorder on Hendricks himself did "not consist simply of a long course of antisocial behavior, but

rather it includes a specific, serious, and highly unusual inability to control his actions." *Id.* Finally, the result of his inability to control his urges posed a very serious danger to children. Under these circumstances, Justice Breyer, while dissenting on the ground that Kansas had violated the Ex Post Facto Clause, concluded that Kansas had acted permissibly in classifying Hendricks as mentally ill and dangerous as those terms had been used in *Foucha*.

C.

Five years later, in *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), the Court again took up a due process challenge to civil commitment. Crane was a convicted sex offender diagnosed with exhibitionism and antisocial personality disorder. He was ordered committed under the same Kansas statute at issue in *Hendricks*. After *Hendricks*, the Kansas Supreme Court interpreted due process to require a finding of a complete lack of volitional control to support civil commitment and ruled Crane's civil commitment unconstitutional. The State of Kansas sought review, and the Supreme Court vacated the judgment.

The Supreme Court held that *Hendricks* did not require a determination that the committed individual had a complete lack of control. Instead, the Court clarified, "*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil

commitment from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* at 412, 122 S.Ct. 867 (internal quotation marks and citations omitted). That distinction was made in *Hendricks* in part by the "presence of what the psychiatric profession itself classifie[d] ... as a serious mental disorder." *Id.* (internal quotation marks omitted) (modification in original). The Court further noted that a "critical distinguishing feature" of the serious disorder in *Hendricks* was "a special and serious lack of ability to control behavior." *Id.* at 412-13, 122 S.Ct. 867. What due process requires in this context, the Court determined, is

> proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Id. at 413, 122 S.Ct. 867. The Court acknowledged the imprecision in its definition but noted that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." *Id.* It

must be so, the Court reasoned, to respect the "considerable leeway" of states in defining the conditions that make individuals eligible for commitment. *Id.* Moreover, "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Id.*

In an additional section of its opinion, the Court noted that, although volitional impairment had been at the center of its analysis in *Hendricks*, which dealt with an individual suffering from pedophilia, the Court had not drawn "a clear distinction between the purely 'emotional' sexually related mental abnormality and the 'volitional.'" *Id.* at 415, 122 S.Ct. 867. "Nor," the Court continued, "when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments. The Court in *Hendricks* had no occasion to consider whether confinement based solely on 'emotional' abnormality would be constitutional, and we likewise have no occasion to do so in the present case." *Id.* (internal citations omitted).

In dissent, Justice Scalia contended that the majority had "gutt[ed]" *Hendricks*, and had introduced significant uncertainties in precisely how state courts could conduct commitment proceedings; requiring commitment to be supported by some degree of inability to control behavior "displays an elegant subtlety of mind," but, he noted, does little to

instruct trial courts conducting commitment proceedings. *Id.* at 422, 423, 122 S.Ct. 867 (Scalia, J., dissenting).

Against this backdrop, we now turn to an analysis of the case before us.

IV

ANALYSIS

A.

As in all habeas corpus proceedings under 28 U.S.C. § 2254, the successful petitioner must demonstrate that he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). For claims actually "adjudicated on the merits in State court proceedings," the statute commands that we undertake a limited review. *Id.* § 2254(d). We evaluate the record to discern only whether the state court's adjudication of the claim (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1), or (2) "was based on an unreasonable determination of the facts in light of the evidence presented," *id.* § 2254(d)(2).

Tese narrow and deferential standards of review do not apply, however, where the relevant state courts did not adjudicate the claims presented on a federal habeas petition. *Cheeks v. Gaetz*, 571 F.3d 680, 684-

85 (7th Cir.2009). In such cases, we apply the general standard of review contained in 28 U.S.C. § 2243, which directs that we "dispose of the matter as law and justice require." *Id.*[10]

B.

We first address Mr. McGee's challenges to the Wisconsin civil commitment procedures. He claims that the procedures fail to ensure, in the language of *Crane*, that commitment be ordered only upon some "proof of serious difficulty in controlling behavior." 534 U.S. at 413, 122 S.Ct. 867. In Mr. McGee's view, this language necessarily requires, in each case, an explicit finding of some inability to control behavior. Because his committing court made no such finding, Mr. McGee contends that his commitment violates the due process standards set forth in *Crane*. We considered and rejected a similar challenge to Wisconsin procedures in *Laxton v. Bartow*, 421 F.3d 565 (7th Cir.2005), but the posture of that case called for highly deferential review under 28 U.S.C. § 2254(d). In Laxton's direct challenge to his commitment, the state court had determined that its statute satisfied *Crane* in the absence of a specific finding. On habeas review, we found that interpretation of *Crane* not unreasonable. *Id.* at 572. We now take up the same question here, when our review, for reasons explained above, is de novo.

We begin with the guidance provided by the

---

[10] We have equated this standard with de novo review. See *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir.2008).

Supreme Court cases we have discussed. In *Crane*, the Court held that the Constitution would not permit civil confinement ordered "without any lack-of-control determination." 534 U.S. at 412, 122 S.Ct. 867 (emphasis in original). Such a determination was necessary, the Court continued, to "distinguish[ ] a dangerous sexual offender subject to civil commitment from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* (internal quotation marks omitted). To satisfy this purpose, the Constitution requires "proof of serious difficulty in controlling behavior," which, admittedly, "will not be demonstrable with mathematical precision." *Id.* at 413, 122 S.Ct. 867. This proof, when viewed in light of the nature and severity of the diagnosis at issue, the Court reiterated, limits civil commitment to the subset of offenders whose "illness, abnormality, or disorder," renders them dangerous and thus forms a constitutional basis for indefinite state custody. *Id.* As we have noted earlier, the explicitness of this guidance, or at least the universality of its application, was placed in question by the ensuing section of the Court's opinion that noted that the Court has not drawn a distinction between volitional, emotional and cognitive impairments.[11]

---

[11] Writing in dissent, Justice Scalia contended that the majority had misread *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), to "establish[ ] the requirement of a finding of inability to control behavior." *Kansas v. Crane*, 534 U.S. 407, 419, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (Scalia, J., dissenting) (emphasis in original). In the view of the dissenting Justices, *Hendricks* had ruled that the Kansas statute's "causal connection between the likelihood of repeat acts of sexual

State and federal courts have been non-uniform in their interpretation of *Crane* with respect to the issue of whether a separate finding is required. The majority of jurisdictions to have considered whether *Crane* imposed a new requirement of a separate finding of serious difficulty to control behavior have concluded that it does not. *See Richard S. v. Carpinello*, 589 F.3d 75, 83-84 (2d Cir.2009) (collecting cases accepting both positions and adopting the majority view).

This case does not require that we answer these broad questions. Mr. McGee contends only that the committing court failed to make a necessary determination about his inability to control his behavior; he does not contend that the State impermissibly relied solely upon an "emotional impairment." Moreover, although the committing court did not make a specific finding about his inability to control his behavior, we believe that such a finding was implicit in the findings that the committing court did make under the specific provisions of the Wisconsin statute.

The Wisconsin statute applies only to sexually

---

violence and the existence of a 'mental abnormality' or 'personality disorder' necessarily establishes 'difficulty if not impossibility' in controlling behavior." *Id.* (emphasis in original). That is, the Kansas statute at issue in *Hendricks* and again in *Crane* passed constitutional muster because an inability to control behavior is implicit in a scheme that requires a nexus between a disorder and the likelihood of recidivism.

violent persons. In the Wisconsin scheme, a "sexually violent person" eligible for commitment is defined as:

> a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

Wis. Stat. § 980.01(7) (emphasis added). The term "mental disorder" is further defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *Id.* § 980.01(2) (emphasis added). Unlike the Kansas statute at issue in *Hendricks* and *Crane*, personality disorders are not listed as a separate and independent statutory basis upon which commitment could be based; Wisconsin instead has interpreted the term "mental disorder" to encompass personality disorders. *See In re Commitment of Adams*, 223 Wis.2d 60, 588 N.W.2d 336, 340 (1998).

The requirement of some inability to control behavior, which the *Crane* dissenters contended was implicit in the Kansas scheme, has been made an

explicit element of eligibility for civil confinement in Wisconsin. The Wisconsin statute expressly requires that, in order to satisfy the legal definition of a "mental disorder," the committed person must suffer from an emotional or volitional impairment. Wis. Stat. § 980.01(2). Moreover, the Supreme Court of Wisconsin has interpreted this statute to require a connection between the person's mental condition and the individual's dangerousness. *See In re Commitment of John Laxton*, 254 Wis.2d 185, 647 N.W.2d 784, 792-93 (2002) (referencing the definition of a SVP in § 980.01(7), *supra*). A person can be adjudicated a sexually violent person only if the person is dangerous because he suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence. The requirement of a connection between the mental disorder in the functioning of the person's emotional or volitional capacity and his likelihood of engaging in sexual violence "necessarily and implicitly requires proof that the person's mental disorder involves serious difficulty for such person in controlling his or her behavior." *Id.* at 793-94. When a Wisconsin court makes a finding that an individual has a "mental disorder" within the meaning of the statute, that court has necessarily found that emotional or volitional capacity is impaired. *See* Wis. Stat. § 980.01(2). Thus, the critical element identified as lacking in *Crane*, "proof of serious difficulty in controlling behavior," 534 U.S. at 413, 122 S.Ct. 867, is an existing requirement under Wisconsin law.

C.

As we have noted, Mr. McGee was diagnosed with two conditions that were offered to establish the requisite "mental disorder" that made him substantially probable to commit future acts of sexual violence. *See* Wis. Stat. § 980.01. Dr. Roberts diagnosed him with a personality disorder NOS with antisocial features; Dr. Marsh agreed with that diagnosis and further diagnosed him with paraphilia NOS-nonconsent.

Mr. McGee asks us to hold that neither diagnosis suffices for due process purposes. First, he contends that both are "invalid and unreliable 'disorders.'" Appellant's Br. 10. Specifically, Mr. McGee notes that, while both diagnoses were purportedly arrived at after consideration of the diagnostic criteria in the DSM, neither is a listed and defined disorder. Instead, both diagnoses derive from catchall "not otherwise specified" categories of disorders.[12] As a result, the specific diagnoses at issue lack generally accepted, standardized diagnostic criteria. Moreover, Mr. McGee contends that the failure of the APA to include the disorders within the DSM demonstrates that the consensus view in the profession does not

---

[12] The DSM identifies broad classes of disorders (e.g., "Anxiety Disorders") and lists within each class specific, related disorders (Panic Disorder, Social Phobia, Obsessive-Compulsive Disorder, etc.), each of which are discussed in some detail and guidelines for the diagnosis of which are provided. Each class of disorder also includes at least one "not otherwise specified" category, for which brief, non-exhaustive examples, but no specific diagnostic criteria, are provided.

find the disorders valid or reliable. Mr. McGee also claims that, even if the use of "not otherwise specified" categories is not categorically infirm, additional problems with his diagnoses have resulted in a denial of due process. He claims that he cannot be diagnosed legitimately with any personality disorder because all personality disorders require, as a diagnostic criterion, presentation in adolescence; the diagnosing professionals acknowledged at trial that no adolescent presentation had been documented in his case. Finally, he claims that the diagnosis of paraphilia NOS (nonconsent or rape) represents an extreme minority viewpoint in the profession that has been explicitly and publicly rejected by the APA in crafting the DSM.

1.

Because Mr. McGee's contentions rely heavily upon the DSM, we begin with some observations about the text. According to the editors, the "highest priority" of the text is "to provide a helpful guide to clinical practice." DSM, xxiii. The editors refer to it as "[a]n official nomenclature," and, as such, make clear that it "must be applicable in a wide variety of contexts" including environments for clinicians and researchers, as well as health and mental health professionals. *Id.* With respect to fields outside of these medical and psychological settings, the text includes a "Cautionary Statement," which provides:

> The specified diagnostic criteria for each mental disorder are offered as

guidelines for making diagnoses, because it has been demonstrated that the use of such criteria enhances agreement among clinicians and investigators. The proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills.

These diagnostic criteria and the DSM-IV Classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field. They do not encompass, however, all the conditions for which people may be treated or that may be appropriate topics for research efforts.

The purpose of DSM-IV is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders. It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or Pedophilia does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations

> involved in categorization of these conditions may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.

DSM, xxxvii (emphasis added).

With respect to the circumstances of forensic evaluations, the DSM includes a specific response. The editors note the "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis" and the resultant "risks and limitations." *Id.* at xxxiii. The text explicitly mentions that a DSM-based diagnosis "does not carry any necessary implications regarding the individual's degree of control over [his] behavior[ ].... Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time." *Id.*; *see also Barefoot v. Estelle*, 463 U.S. 880, 920, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (Blackmun, J., dissenting) (quoting the Brief for the American Psychiatric Association as Amicus Curiae for the proposition that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession"). Clearly, however, the APA is aware that its text is used for forensic purposes, even though standardization in that context was not a goal of the

APA in drafting the DSM. The text notes the value of "the use of an established system of diagnosis," as is provided in the DSM, to "enhance[ ] the value and reliability" of legal determinations, including those relevant to involuntary civil commitment. DSM, xxxiii.

Despite its limitations in a non-medical setting, the DSM is a highly influential and useful tool. The Supreme Court has cited the DSM authoritatively, most notably in *Crane*, 534 U.S. at 411, 414, 122 S.Ct. 867; *see also Hendricks*, 521 U.S. at 372, 117 S.Ct. 2072 (Kennedy, J., concurring) (noting with approval that the disorder which formed the basis of the commitment proceedings was "at least described in the DSM[ ]"). Many mental health professionals have advocated that a valid, DSM-recognized diagnosis be a necessary, but not sufficient, condition for involuntary civil commitment.[13]

---

[13] See, e.g., John Matthew Fabian, To Catch a Predator, And Then Commit Him for Life, 33 Champion 44, 49 (Feb.2009) (noting that it "is critical ... that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify psychiatric disorders that are defined in the DSM[ ]"); Robert A. Prentky et al., Sexually Violent Predators in the Courtroom: Science on Trial, 12 Psychol. Pub. Pol'y & L. 357, 364 (2006) ("The classification of a syndrome as a mental disorder in the DSM[ ] must be regarded as the primary standard for medical validity in the SVP context."); Brett Trowbridge & Jay Adams, Sexually Violent Predator Assessment Issues, 26 Am. J. Forensic Psychol. 29, 37 (2008) ("Although a diagnosis of a DSM[ ] mental disorder is not sufficient in and of itself to meet [the civil commitment] standard, it nevertheless permits the evaluator to utilize

Whether a legitimate mental health diagnosis must be based on the DSM is a question for the members of the mental health profession, and, therefore, one to which we do not address ourselves. Our concern is with the due process requirements for the relevancy and legitimacy of evidence adduced in civil commitment proceedings. In that narrow legal context, we cannot adopt any rule that asks the DSM to do what the text itself professes that it was not intended to do: answer ultimate legal questions or create a perfect fit between law and medicine in the realm of involuntary civil commitment.

Not only has the Supreme Court cautioned that bright-line rules are often an ill-fit for this context, *see Crane*, 534 U.S. at 413, 122 S.Ct. 867, it has spoken directly to the issue of medical evidence in commitment proceedings: "[T]he science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Id.*; *see also Hendricks*, 521 U.S. at 359, 117 S.Ct. 2072 ("Legal definitions ... need not mirror those advanced by the medical profession."). Having made clear in *Foucha* that dangerousness without proof of some underlying mental condition is not sufficient to sustain an involuntary commitment, the Court's more recent statements have reflected the need to provide states with "leeway" in crafting legal standards reflecting

---

accepted diagnostic categories and thus go beyond mere opinion or speculation.").

the available science. *Crane*, 534 U.S. at 413, 122 S.Ct. 867; *Hendricks*, 521 U.S. at 374, 117 S.Ct. 2072 (Breyer, J., dissenting).

The Supreme Court's cases on this point teach that civil commitment upon a finding of a "mental disorder" does not violate due process even though the predicate diagnosis is not found within the four corners of the DSM. A factfinder may have stronger confidence in his conclusions when the examining mental health professionals rely upon authoritative, consensus materials in the field. *See Crane*, 534 U.S. at 412, 122 S.Ct. 867 (noting that, in *Hendricks*, the committed person was distinguished from other dangerous persons not subject to commitment, in part by the "presence of what the psychiatric profession itself classifie[d] ... as a serious mental disorder" (modification in original) (internal quotation marks omitted)); *Hendricks*, 521 U.S. at 372, 117 S.Ct. 2072 (Kennedy, J., concurring) (finding support for the conclusion that the commitment was lawful in the fact that the diagnosis at issue "is at least described in the DSM[ ]"). Indeed, reliance on such a respected source permits reliability that should not be minimized when so grave a restriction of individual liberty is at issue. Likewise, when a particular diagnosis is not accepted or is explicitly rejected by the DSM or other authoritative sources, that factor is a highly relevant consideration for the factfinder. In either situation, however, the factfinder has the ultimate responsibility to assess how probative a particular diagnosis is on the legal question of the existence of a

"mental disorder"; the status of the diagnosis among mental health professionals is only a step on the way to that ultimate legal determination. The methodology and the outcome of any mental health evaluation offered as evidence is a proper subject for cross-examination, and we would expect that, in the ordinary case, such efforts would expose the strengths and weaknesses of the professional medical opinions offered.

No doubt, a medical diagnosis can be based on so little evidence that bears on the controlling legal criteria that any reliance upon it would be a violation of due process. *See Hendricks*, 521 U.S. at 373, 117 S.Ct. 2072 (Kennedy, J., concurring) (noting that a constitutional violation may be found "if it were shown that mental abnormality is too imprecise a category"). Therefore, a particular diagnosis may be so devoid of content, or so near-universal in its rejection by mental health professionals, that a court's reliance on it to satisfy the "mental disorder" prong of the statutory requirements for commitment would violate due process. Whether that point was reached in this case is the question to which we now turn.

2.

Both diagnoses at issue are based purportedly on "not otherwise specified," or NOS, diagnoses within the general classes of personality disorders and paraphilias. Perhaps in anticipation of criticism that these categories are too amorphous to provide the

kind of standardized, clinical guidance found elsewhere in the text, the DSM provides an explicit explanation of its use of NOS diagnoses. It begins by noting that "the diversity of clinical presentations" makes it "impossible for the diagnostic nomenclature to cover every possible situation." DSM, 4. The introductory note then identifies four specific situations in which an NOS diagnosis may be appropriate. They include situations in which, although the presentation reflects the general guidelines for a diagnostic class, "the symptomatic picture does not meet the criteria for any of the specific disorders. This situation would occur either when the symptoms are below the diagnostic threshold for one of the specific disorders or when there is an atypical or mixed presentation." *Id.* (emphasis added). In addition, where a "symptom pattern" is not consistent with a specific DSM classification, but "clinically causes significant distress or impairment," an NOS diagnosis likewise would be appropriate. *Id.*

Mr. McGee is generally critical of the use of NOS categories because, in the view of some professionals, they are "'less of a real diagnostic category than a receptacle for miscellaneous symptoms.'" Appellant's Br. 11 (quoting Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 J. Sex. Offender Civ. Commitment 17, 67 (2005)); *see also* Brett Trowbridge & Jay Adams, Sexually Violent Predator Assessment Issues, 26 Am. J. Forensic Psych. 29, 42 (2008) ("[T]he NOS categories are not

diagnostic categories at all but merely catch-all categories for symptoms not listed elsewhere."). He also makes more specific objections. First, he contends that the state court erroneously accepted a diagnosis of personality disorder NOS with antisocial features, as based in the DSM, even though Mr. McGee did not meet the diagnostic criteria for any personality disorder or meet the DSM's more specific guidelines for a personality disorder NOS diagnosis. Second, he contends that his diagnosis for paraphilia NOS (nonconsent or rape) has been rejected explicitly by the profession and is only accepted by an extreme minority primarily composed of state-employed professionals charged with civil commitment evaluations. We shall address the due process challenges raised in each of these objections.

a.

With regard to his personality disorder diagnosis, Mr. McGee makes specific, textual arguments based on the DSM. We therefore begin with a brief explanation of the structure of the text. With each class of disorder, the DSM provides general diagnostic criteria that apply to all of the listed disorders within the class. In the case of personality disorders, that list includes six criteria, the first of which states that the affected individual exhibits "[a]n enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture." DSM, 689. Another criterion states that this pattern "is stable and of long duration, and its onset can be traced back

at least to adolescence or early adulthood." *Id.* (emphasis added). After these general guidelines are set forth, the text examines a number of specific disorders within the class. In the discussion of Antisocial Personality Disorder, or APD, (with which Mr. McGee was not diagnosed, but which bears the closest relationship to his diagnosis of personality disorder NOS with antisocial features), the first listed diagnostic criterion is "a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years." *Id.* at 706.

In testimony at trial, the experts conceded that there was no evidence demonstrating the onset of an antisocial personality in Mr. McGee's adolescence. R.16, Ex. 83 at 120-21 (Dr. Roberts); *Id.*, Ex. 84 at 35 (Dr. Marsh). It was for that specific reason, according to one expert, that Mr. McGee was given an NOS diagnosis with antisocial features, rather than a diagnosis for the specific disorder of APD. Mr. McGee objects that this approach was clinically invalid because it failed to take account of the general diagnostic criteria in the personality disorder class, which also require onset in adolescence. Thus, his argument goes, the expert testimony, while cloaked in the authority of the DSM, was, in fact, invalid.

Mr. McGee essentially has asked us to rule that, in order for a diagnosis to be considered as evidence of a mental disorder, mental health professionals applying the DSM must do more than the text itself requires. The introductory materials to the DSM emphasize that:

> [t]he specific diagnostic criteria included in [the] DSM[ ] are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion. For example, the exercise of clinical judgment may justify giving a certain diagnosis to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe.

DSM, xxxii (emphasis added). The DSM itself thus explicitly contemplates that trained professionals will apply it with informed clinical judgment to reach a conclusion; it cautions that it should "not be applied mechanically by untrained individuals." *Id.*

More fundamentally, however, our task is decidedly different from the professionals who evaluated Mr. McGee, reached a diagnosis and testified at his trial. We must inquire only whether the diagnosis was so patently lacking in credibility and validity that its consideration by the factfinder in the Wisconsin courts resulted in a denial of constitutional rights. Although we acknowledge the variance between some of the clinicians' factual statements and the specific criteria in the DSM, we do not think, given the role assigned to NOS diagnoses in the mental health profession, that the state court was precluded from considering the personality disorder NOS

diagnosis in making its decision that Mr. McGee suffered from a mental disorder that impaired his volitional capacity. The Supreme Court has made it clear that the states have great flexibility in the crafting of a definition of mental impairment. The Wisconsin definition is clearly designed to identify individuals who, unlike the typical recidivist, are unable to exert full volitional control over their violent sexual impulses. The NOS criteria, although not as specific as the delineated categories of established psychiatric diagnosis, can be useful tools, when employed with prudence and caution, in making the legal determination as to whether an individual falls within the ambit of the statute.

b.

The diagnosis for paraphilia NOS (nonconsent or rape), reached only by one of the two clinicians, presents a more complicated picture. Even its most ardent advocates acknowledge that the diagnosis is "probably ... the most controversial among the commonly diagnosed conditions within the sex offender civil commitment realm." Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 63 (2002). The general class of disorders termed "paraphilias" refers to conditions involving "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months." DSM, 566

(emphasis added). Listed paraphilias include exhibitionism, fetishism, frotteurism, pedophilia, sexual masochism, sexual sadism, transvestic fetishism and voyeurism. *Id.* at 566-75. In addition, the DSM includes a category of Paraphilia Not Otherwise Specified, which is explained as the appropriate diagnosis "for Paraphilias that do not meet the criteria for any of the specific categories." *Id.* at 576. The DSM contains a non-exhaustive list of examples: "telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine)." *Id.* at 573. Although the description of sexual sadism includes a reference to rape as a potential subject of fantasies or behaviors associated with the disorder, rape is only consistent with a sadism diagnosis when "it is the suffering of the victim that is sexually arousing" to the person with the disorder. *Id.* Other than this reference (and a companion reference in the description of sexual masochism), rape is not otherwise included in the described Paraphilias or in the exemplary list of NOS Paraphilias.

In preparation for the DSM-III revision, a rape-related paraphilia ("paraphilic rapism") was considered for inclusion. Zander, *supra*, at 45. It was suggested as a distinct diagnosis because, for an afflicted individual, it is "the coercive nature of the sexual act that is sexually exciting, and not signs of ... suffering of the victim," as is the case in sadism. *Id.* at 46 (*citing* DSM revision Work Group

documents). Significant opposition from interest groups surrounded the suggestion, and the diagnosis ultimately was rejected for inclusion in the main text of the DSM in 1986. *Id.* At the conclusion of the main text, the DSM sets forth a list of "Other Conditions that May Be a Focus of Clinical Attention," although they are not considered "mental disorders" sufficient to merit inclusion in the main text. DSM, 731. Within this listing appears a category called "Sexual Abuse of Adult," which, according to the text, "should be used when the focus of clinical attention is sexual abuse of an adult (e.g., sexual coercion, rape)." *Id.* at 738.

Mr. McGee contends that this rejection by the DSM demonstrates the consensus professional view that a paraphilia NOS (nonconsent or rape) diagnosis is invalid. His contention is not without support in the professional literature.[14] A frequently cited difficulty in accepting a rape-related paraphilia diagnosis is that the lack of generally accepted standards results

---

[14] See Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 J. Sex. Offender Civ. Commitment 17, 41-47 (2005); Holly Miller et al., Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions, 29 L. & Hum. Behavior 29, 39 (2005) ("Numerous evaluators have utilized the diagnosis 'paraphilia not otherwise specified' to apply to rapists. However, the definition of this appellation is so amorphous that no research has ever been conducted to establish its validity (in fact the word rape is not even mentioned in the Paraphilia NOS diagnostic description)."); Prentky et al., *supra* note 13, at 367 (noting the possibility that the category is "a wastebasket for sex offenders," and thus, "taxonomically useless").

in poor diagnostic reliability; that is, different evaluators may be likely to reach different conclusions with respect to the same individual at unacceptably high rates. *See, e.g.*, Trowbridge & Adams, *supra*, at 44 ("NOS diagnoses have the worst levels of inter-rater reliability.... [T]he diagnosis of paraphilia NOS had an inter-rater reliability so low ... that it fell well into the poor category."). The converse view, and the one adopted by one of clinicians in Mr. McGee's proceedings and accepted by the committing court, also has support in the literature.[15]

Given these admittedly conflicting professional views, we must conclude, on the basis of present Supreme Court precedent, that the diagnosis of a paraphilic disorder related to rape is not so unsupported by science that it should be excluded absolutely from consideration by the trier of fact. We reach this conclusion primarily because of the Supreme Court's repeated statements that states must have appropriate room to make practical, common-sense judgments about the evidence presented in commitment proceedings. As Justice

---

[15] See, e.g., Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 63 (2002); Gregory DeClue, Paraphilia NOS (Nonconsenting) and Antisocial Personality Disorder, 34 J. Psychiatry & L. 495, 511-12 (2006); Jack Vognsen & Amy Phenix, Antisocial Personality Disorder is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick, 32 J. Am. Acad. Psychiatry & L. 440, 442 (2004) (contending that forensic experts "must diagnose paraphilia" when an individual suffers more than a personality disorder because of a sexual deviance involving rape).

Breyer wrote in considering the diagnosis of pedophilia in *Hendricks*, the "presence and vigor" of professional debate on the subject of whether a particular condition qualifies as an illness is important, because "[t]he Constitution permits a State to follow one reasonable professional view, while rejecting another." 521 U.S. at 375, 117 S.Ct. 2072 (Breyer, J., dissenting). "The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds." *Id.*[16] We are mindful of Justice Kennedy's admonition that if a state's mental health predicate for civil commitment becomes "too imprecise a category," it may run afoul of the

---

[16] The State of Wisconsin is not alone, among jurisdictions providing for civil commitment, in concluding that a paraphilic rape disorder can be the predicate diagnosis, or one piece of predicate diagnoses. See, e.g., *Brock v. Seling*, 390 F.3d 1088, 1091 (9th Cir.2004) (per curiam) (denying habeas relief); *In re Detention of Moore*, 167 Wash.2d 113, 216 P.3d 1015, 1019 (2009) (en banc); *In re Care and Treatment of Colt*, 289 Kan. 234, 211 P.3d 797, 804 (2009); *In re Civil Commitment of W.X.C.*, 407 N.J.Super. 619, 972 A.2d 462, 466, 467 (2009), certification granted, 200 N.J. 475, 983 A.2d 201 (2009); *In re A.M.*, 766 N.W.2d 437, 441 (N.D.2009); *In re Detention of Hardin*, 391 Ill.App.3d 211, 330 Ill.Dec. 101, 907 N.E.2d 914, 917, 922 (2009) (reversing the trial court's determination that a petition for commitment based in part on a diagnosis of paraphilia NOS-nonconsent did not demonstrate probable cause), appeal allowed, 233 Ill.2d 558, 335 Ill.Dec. 633, 919 N.E.2d 352 (Ill. Sept. 30, 2009); *In re R. Y., Jr.*, 957 A.2d 780, 782, 786 (2008); *Dunivan v. State*, 247 S.W.3d 77, 78 (Mo.Ct.App.2008); *State v. Shaw*, 929 So.2d 1145, 1147-48 (2006); *People v. Williams*, 31 Cal.4th 757, 3 Cal.Rptr.3d 684, 74 P.3d 779, 781-82 (2003).

Constitution. *Id.* at 373, 117 S.Ct. 2072 (Kennedy, J., concurring). The existence of a heated professional debate over a particular diagnosis does not indicate that such a line has been crossed here.

The professional objections to the diagnosis of paraphilia NOS (nonconsent or rape) are not without persuasive value. The existence of the debate is a relevant issue in commitment proceedings and a proper consideration for the factfinder in weighing the evidence that the defendant has the "mental disorder" required by statute. Given the present state of Supreme Court precedent, however, we cannot conclude that the diagnosis of a rape-related paraphilia is so empty of scientific pedigree or so near-universal in its rejection by the mental health profession that civil commitment cannot be upheld as constitutional when this diagnosis serves as a predicate.

Conclusion

The primary due process concern of the Supreme Court in the area of civil commitment is the necessity of distinguishing between the typical dangerous recidivist and the offender whose dangerousness is caused by some identifiable mental condition that impairs his ability to refrain from activity dangerous to others. The Wisconsin SVP statute, by its very language, accomplishes this result. Limited to the sexually dangerous, it narrows the class of offender eligible for commitment by requiring a judicial determination that a mental

condition impairs the offender's ability to refrain from sexually dangerous activity. In Mr. McGee's case, the Wisconsin committing court found that Mr. McGee's admitted sexual dangerousness was caused by a mental condition. In reaching that conclusion, it relied upon the assessments of two mental health professionals who concluded that Mr. McGee was afflicted with conditions that satisfied the Wisconsin legal criteria for a "mental disorder." These diagnoses, which were constitutionally adequate under existing Supreme Court precedent, and the evidence upon which the diagnoses were based, afforded the Wisconsin committing court an adequate basis, under the Due Process Clause, to order his commitment.

Accordingly, the judgment of the district court denying the writ of habeas corpus must be affirmed.

AFFIRMED

C.A.7 (Wis.),2010.
McGee v. Bartow
593 F.3d 556

Appendix B

United States District Court,
E.D. Wisconsin.
Michael McGEE, Petitioner
v.
Byran BARTOW, Respondent.
No. 06-C-1151.

Aug. 23, 2007.

Michael L. McGee, Winnebago, WI, pro se.

Warren D. Weinstein, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, for Respondent.

DECISION AND ORDER

WILLIAM C. GRIESBACH, United States District Judge.

Michael L. McGee is, to use Wisconsin's parlance, a "sexually violent person." Wis. Stat. § 980.01(7). He committed a sexual assault in the midst of breaking into a house he thought would be empty. Soon before McGee was due to be released from a revoked probation (drugs were the cause of the revocation), the state petitioned to keep McGee locked up under its Chapter 980 program because it believed he was likely to commit another sex crime. The state argued that the burglary was a sexually motivated offense and that McGee suffered from a mental disorder that

made him likely to reoffend. After a trial in which McGee represented himself, the judge found that McGee met the state's requirements for involuntary incarceration under Chapter 980.

Earlier in these proceedings, the state moved to dismiss on the ground that McGee had procedurally defaulted the claim he now brings in this § 2254 petition. I disagreed, finding that McGee had presented the essence of his claim to the state courts. The petition is thus ready for evaluation on its merits. For the reasons given below, the petition will be dismissed.

As set forth in this court's order denying the respondent's motion to dismiss, McGee's claim is that due process was violated because the state relied upon a diagnosis not recognized in the field of mental health as a basis to civilly confine an individual indefinitely. In McGee's case, the diagnosis was personality disorder NOS (not otherwise specified) with antisocial features, and McGee argues that this is essentially a bogus, outcome-driven diagnosis tailored to keep him locked up. He also incorporates into this argument a claim that the state experts' use of actuarial instruments to predict his future dangerousness violates due process.[1]

---

[1] Although this is the essence of McGee's claim, and the state has briefed the claim in its own right, it seems that actually McGee's claim-the one exhausted in the state courts-is that his appellate lawyer was ineffective for failing to make this argument. But because I find the claim ultimately fails, it follows that his appellate counsel was not ineffective for failing to raise it in McGee's appeal.

That brings us to the standard of review. Typically a federal court gives significant deference to the legal and factual determinations of the state courts, a practice based on comity, economy, and 28 U.S.C. § 2254(d). But when the state courts do not even reach the question raised in the federal habeas petition, there is no decision to which a federal court may defer. Thus, the deference required by § 2254(d) only applies to "any claim that was adjudicated on the merits in State court proceedings." Because McGee's claim was not adjudicated on the merits in state court, the respondent concedes that the § 2254(d) standard of review does not apply. Instead, courts in such a case are required to "dispose of the matter as law and justice require." *Guest v. McCann*, 474 F .3d 926, 931 (7th Cir.2007); 28 U.S.C. § 2243.

As noted earlier in these proceedings, McGee's argument is quite narrow. He is not challenging the ability of the state to incarcerate anyone based on an antisocial personality disorder; instead, he argues that his own diagnosis (which he describes as "features" of a personality disorder) does not live up to the Supreme Court's requirements for due process. Essentially, his claim is that personality disorder NOS, combined with reliance on actuarial assessments that attempt to predict his future dangerousness, do not provide sufficient evidence that he meets the Supreme Court's requirements for involuntary incarceration.

In *Kansas v. Crane*, the Supreme Court made clear

that courts should be driven more by practical considerations than the technical distinctions underlying much of psychiatry.

> we did not give to the phrase "lack of control" a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior.

534 U.S. 407, 413 (2002). That is, there are no magic words that a court or jury can use to determine if an individual may be incarcerated because he lacks control. And just as there are no magic words, there are no magic diagnoses: the state defines a "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. § 980.01(2). Thus, all that is required is a mental condition predisposing the defendant to commit acts of sexual violence. In other words, for due process purposes it matters little whether the disorder is described as "antisocial personality disorder" or "personality disorder with antisocial features."

The Seventh Circuit considered an argument similar to the one McGee makes in *Adams v. Bartow*: "The essence of Adams' claim is that it is a violation of due

process to civilly commit a person based solely on the fact that he is a previously convicted sex offender with APD [antisocial personality disorder]." 330 F.3d 957, 960 (7th Cir.2003). The court rejected this claim for a number of reasons. Key among them was that Adams-like McGee-had *not* been committed "solely" on the basis that he had APD and had committed a prior sexual offense. Indeed, because roughly half of all prison inmates are likely diagnosable with APD, an APD diagnosis on its own would not suffice to distinguish dangerous, committable sex predators from more common recidivists. In other words, if APD plus a prior sex offense were enough, thousands of inmates would be eligible for Chapter 980 and similar programs, which would mean that "'civil commitment' [would] become a 'mechanism for retribution or general deterrence'-functions properly those of criminal law, not civil commitment." *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

Thus the *Adams* court seemed to suggest that it would be impermissible to commit a defendant *solely* because he had an APD diagnosis and a prior sex offense. In that sense, McGee is correct that he may not be incarcerated solely because he has a personality disorder NOS. Yet, as noted in *Adams*, the personality disorder was not the entire basis for Adams' confinement; as the Seventh Circuit concluded: "The court [of appeals] found Adams eligible for confinement under Chapter 980 not only because he is a sex offender with APD but also because there was enough evidence in the trial

record to establish that Adams was "substantially probable" to commit another sexually violent offense." 300 F.3d at 962. In particular, what distinguished Adams from the typical recidivist was his history of offenses, treatment failure, and the opinion of both a psychologist and a psychiatrist that there was a "substantial probability that [Adams] will reoffend or recommit a sexually violent act." *Id.* at 959.

The same is true here. McGee was committed not solely because he had a personality disorder with antisocial features. As in *Adams*, two mental health professionals, Drs. Roberts and Marsh, opined that McGee had personality disorder NOS with antisocial features; Dr. Marsh also diagnosed McGee with paraphilia NOS. The trial judge found their testimony credible, even "impressive." (Tr. 58.[2]) The experts concluded not only that McGee had a personality disorder, but that he had serious difficulty controlling his behavior. As Dr. Roberts noted in his report, McGee had a disorder that "predispose[d] him to commit future sexually violent acts." (Petitioner's Br., Ex. F at 2.) McGee's argument suggests that, because some of this testimony was based on actuarial considerations, it does not distinguish him from a substantial minority or majority of prison inmates. Yet there is no indication that the actuarial data at issue here would have applied to most prison inmates; McGee's scores on the various actuarial models were conditioned on

---

[2] The transcript of the trial judge's findings is found at Docket No. 16, Ex. 84.

his own prior history. There is, in other words, nothing inherently wrong in an expert's use of actuarial-type instruments that predict future violence from past behavior: as the Seventh Circuit has noted in another case, "[e]ven Laxton's own expert acknowledged that his prior sexually violent acts could be a compelling predictor of future violent sexual offenses." *Laxton v. Bartow*, 421 F.3d 565, 572 (7th Cir.2005); *see also*, *Carmony v. Hunter*, No. CIV S-03-0927 DFL JFM, 2006 WL 3762110, *15 (E.D.Ca .2006) (noting that actuarial tests are comm y used in SVP cases); *Johnson v. Hunter*, No. C 3-3233 PJH, 2006 WL 2263932, *4 (N. D.Cal.2006) (petitioner's confinement upheld when RRASOR score showed a 49.8 percent risk of re-offending, and Static 99 showed a score of five).

In sum, McGee was not incarcerated merely because he had "features" of a personality disorder; he was found to be a SVP based on testimony that he had a mental disorder that caused him to have serious difficulty controlling his behavior. That is what due process requires. *Crane*, 534 U.S. at 413.

Accordingly, the petition is **DISMISSED**.

E.D.Wis.,2007.
McGee v. Bartow
Not Reported in F.Supp.2d, 2007 WL 2442252 (E.D.Wis.)

Appendix C

United States District Court,
E.D. Wisconsin.
Michael McGEE, Petitioner,
v.
Byran BARTOW, Respondent.
No. 06-C-1151.

April 3, 2007.

Michael L. McGee, Winnebago, WI, pro se.

Warren D. Weinstein, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, for Respondent.

MEMORANDUM DECISION AND ORDER DENYING MOTION TO DISMISS

WILLIAM C. GRIESBACH, United States District Judge.

Petitioner Michael McGee seeks relief from his civil commitment as a "sexually violent person" pursuant to Chapter 980 of the Wisconsin Statutes. The case is presently before me on the motion of the respondent to dismiss for procedural default. For the reasons that follow, respondent's motion will be denied.

Chapter 980 sets forth Wisconsin's procedure for civilly committing individuals previously convicted of a sexually assaultive offense who are deemed likely

to re-offend. Motivated by a desire to protect the public, especially children, from the horror of sexual abuse and assault, Wisconsin was one of the early States to enact a law authorizing the indefinite detention of individuals previously convicted of a "sexually violent offense" upon completion of their sentence. Sex offender civil commitment laws, such as Wisconsin's, strike many as irreconcilable with the principles that underlie the traditional models of both criminal incarceration and civil commitment. Although reserved for individuals who have been previously convicted of a sexually violent offense, a Chapter 980 commitment does not constitute punishment for a crime. The double jeopardy clause of the Fifth Amendment forbids a second punishment for the same crime and, by its explicit terms, a Chapter 980 commitment can only occur after a person has already been punished for his crime and is about to be released. Wis. Stat. § 980.015(2).

Nor does a Chapter 980 commitment rest on the presence of a mental illness that renders an individual legally incompetent and thus not responsible for his actions. While a person found "not guilty of or not responsible for a sexually violent offense by reason of insanity, mental disease, defect, or illness," is eligible for commitment under Chapter 980, *see* Wis. Stat. § 980.01(7), few, if any, of the individuals actually committed under Chapter 980 assert such a defense to their underlying crimes. Most, if not all, are presumed to be free human beings legally responsible for their crimes and thus deserving of the punishment that was previously

imposed.

This is not to say that there is no mental health component to a Chapter 980 commitment. To be committed as a sexually violent offender, an individual must not only have previously committed a sexually violent offense, but he must have a mental disorder, meaning "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. § 980.01(2). The mental health condition required for a Chapter 980 commitment, however, is not of the kind or severity that was traditionally thought necessary for the state to deprive an individual of his liberty. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (plurality opinion) (holding that continued commitment of insanity acquittee on the basis of personality disorder without evidence of mental illness violates due process); *Simpson v. State*, 215 N.W.2d 435, (Wis.1974) (rejecting argument that antisocial personality disorder constitutes a mental illness for purpose of insanity defense). To justify the commitment of a person previously convicted of a sex offense, the Supreme Court has ruled that it is enough to satisfy due process that the state demonstrate that as a result of the metal disorder the individual has "serious difficulty in controlling [his] behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The Wisconsin Supreme Court has construed this element as implicit in Chapter 980's requirement that the individual be proven "dangerous to others because the person's mental disorder makes it likely

that he or she will engage acts of sexual violence." Wis. Stat. § 980.02(2)(c); *see State v. Laxton*, 647 N.W.2d 784, 793 (Wis.2002); *see also Laxton v. Bartow*, 421 F.3d 565, 571 (7th Cir.2005) (affirming denial of habeas corpus relief). This element is typically established through the use of so-called "actuarial instruments" which are based on statistical profiles of other sexual offenders. *See, e.g., In re Tainter*, 2002 WI App 296, ¶¶ 4-5, 259 Wis.2d 387, 392-93, 655 N.W.2d 538, 541; *In re Brown*, 2005 WL 3201267 *2 (Wis.App. Dec. 1, 2005). In this case, for example, the experts reported McGee's likelihood of re-conviction for a sexual offense within ten years at 48.6% based on the Rapid Risk Assessment for Sex Offense Recidivism (RRASOR) and 52% within fifteen years based on the Static-99. (Mot. to Dismiss, Ex. D, State Pet. for Habeas Corpus, Ex. F at 3.) Of course, a statistical profile based on other individuals says nothing about whether the specific individual who is then before the court will re-offend, since each individual is a free human being capable of choosing right or wrong. Moreover, even under the statistical model used by the State, roughly half of the individuals matching McGee's profile would not re-offend within the stated period of time but would nevertheless be eligible for indefinite confinement.

In any event, notwithstanding their seeming clash with traditional principles limiting the authority of the state to deprive individuals of their liberty, and even doubts as to their effectiveness, *see* Monica Davey and Abby Goodnough, Doubts Rise as States Hold Sex Offenders After Prison, The New York

Times, March 4, 2007, sex offender civil commitment statutes have been upheld by the Supreme Court and are increasing across the country. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407. Thus, to the extent McGee's challenge to his confinement is directed at the authority of the State generally to confine an individual upon a determination that he is a sexually violent person, his challenge must fail. But McGee's challenge is more specific. McGee claims his incarceration under Chapter 980 violates the Constitution because it is based on a diagnosis of personality disorder that does not comport with the requirements of due process. The particular argument framed by the petitioner is that it would be unconstitutional to confine him based on "mere features of an antisocial personality disorder" as opposed to an "actual" diagnosis of antisocial personality disorder. (Reply Br. at 3.) The distinction he draws is a narrow one: he asserts that he is not challenging the state's general authority to commit an individual under Chapter 980 on the basis of a diagnosis of antisocial personality disorder, authority that the Seventh Circuit explicitly recognized in *Adams v. Bartow*, 330 F.3d 957 (7th Cir.2003); instead, McGee is challenging the state's authority to commit someone (him) when that individual has not actually been diagnosed with such a disorder.[1] His argument brings to mind Justice

---

[1] McGee's argument is not without merit. For a more scholarly discussion of the issue he raises, *see* Zander, Thomas K., Civil Commitment Without Psychosis: *The Law's Reliance on the Weakest Links in Psy-chodiagnosis*, Journal of Sexual Offender Civil Commitment: Science and the Law 1 (2005)

Kennedy's caution in *Hendricks* that "if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to justify it." 521 U.S. at 373 (Kennedy, J., concurring).

The merits of McGee's petition, however, are not presently before me. In response to McGee's petition, the respondent has filed a motion to dismiss in which he argues I cannot reach the merits of McGee's petition because McGee procedurally defaulted the claim by failing to properly raise it in the state courts so that those courts would have a full and fair opportunity to address it before he sought federal relief. Exhaustion of state court remedies is a prerequisite to seeking federal habeas corpus. *See* 28 U.S.C. § 2254(b)(1)(A); *Kurzawa v. Jordan*, 146 F.3d 435, 441 (7th Cir.1998) ("Initially, the state courts must have had a 'fair opportunity' to consider a question of constitutional import before federal collateral review on that question is appropriate.") (*citing Burgin v. Broglin*, 900 F.2d 990, 996 (7th Cir.1990)). Thus, if respondent is correct that McGee has not exhausted his state court remedies and he cannot show cause for his default and prejudice resulting therefrom, *Richardson v. Briley*, 401 F.3d 794, 801 (7th Cir.2005), McGee's petition must be dismissed regardless of the merits. To address that issue, it is necessary to recount the procedural history of the case in some detail.

On November 23, 1987, McGee was convicted of

burglary and second degree sexual assault in the Circuit Court for Racine County, Wisconsin. According to the complaint, McGee entered an apartment through a window and awakened a woman who had been sleeping on a couch with her two-year-old child. Stating something to the effect of "there isn't supposed to be anyone here," McGee ordered the woman who had just moved into the apartment not to awaken any of her children and then proceeded to rape her. (Mot. to Dismiss, Ex. B., ex. 4.) For this rape, the court sentenced McGee to eight years in prison, and for the burglary, the court imposed and stayed a sentence to prison and placed him on probation for six years consecutive to his prison sentence for the rape. When McGee was nearing the end of his sentence for the sexual assault, a petition to involuntarily commit him under Chapter 980 was filed. Although he was committed at that time, the commitment order was later vacated after the Wisconsin Court of Appeals remanded that case to the circuit court for a post-commitment hearing. Having completed his sentence for the sexual assault, McGee was then released to begin the probationary term imposed for the burglary. (Mot. to Dismiss, Ex. B., at 7-8.)

Sometime thereafter, McGee's probation was revoked for a "dirty drug test," and he was returned to prison on the previously imposed but stayed sentence for the burglary. (Pet.'s Br. in Supp. of Habeas Corpus at 2.) In 2003, as he was again nearing the end of his sentence, this time for the burglary, the State filed a petition seeking his commitment under Chapter 980.

(Mot. to Dismiss, Ex. B at 101.) Following a trial to the court in which McGee represented himself, he was found to be "a sexually violent person" as defined by Wis. Stat. § 980.01(7) and committed to the custody of the Wisconsin Department of Health and Family Services until cured.

McGee, now represented by counsel, appealed his commitment to the Wisconsin Court of Appeals. However, McGee's attorney raised only two issues on his direct appeal. He claimed (1) that the evidence was insufficient to prove that the predicate offense alleged in the petition, namely the burglary, was sexually motivated as required by § 980.01(6)(b); and (2) that a new trial was warranted in the interest of justice. (Mot. to Dismiss, Ex. B at i-ii.) The Wisconsin Court of Appeals rejected both claims and affirmed the commitment. (Mot. to Dismiss, Ex. C.) McGee then filed a petition for state habeas corpus pursuant to *State v. Knight*, 484 N.W.2d 540 (1992), alleging that his appellate attorney was ineffective in failing to challenge his commitment on due process grounds. More specifically, McGee claimed, as he does in this case, that he was committed based on a diagnosis of personality disorder, not otherwise specified, with antisocial features. McGee argued that this diagnosis is essentially a "bogus disorder" that was invented by state psychologists to justify his continued confinement after he completed his sentence. (Mot. to Dismiss, Ex. D. at 3.) Citing the Wisconsin Supreme Court's decision in *Simpson v. State*, 62 Wis.2d 605, 611-12, 215 N.W.2d 435, 439 (Wis.1974), McGee also argued that an antisocial personality disorder, by

definition, does not cause inability to control one's behavior. (*Id.* at 4.) Thus, he claimed that his involuntary commitment on the basis of such a diagnosis violated his Fourteenth Amendment right to due process of law as set forth by the United Supreme Court in *Kansas v. Crane*, 534 U.S. 407 (2002), and that his appellate attorney had provided constitutionally deficient performance in failing to raise the issue in his direct appeal.

The Wisconsin Court of Appeals denied McGee's pro se petition without really addressing the substantive due process issue he sought to raise. Finding McGee's argument "difficult to understand," the Court of Appeals construed his claim as a criticism of his attorney for failing to challenge the state's use of actuarial instruments to diagnose his mental disorder. (Mot. to Dismiss, Ex. E at 4.) The state court ignored McGee's claim that he could not be constitutionally committed based on a diagnosis of personality disorder, not otherwise specified, with antisocial features. It stated that McGee's petition was simply an attempt to retry the Chapter 980 proceeding and noted that its previous opinion affirming his commitment had focused on his intent in committing the underlying burglary and not the expert testimony. In an unexplained leap of logic, the Court then concluded: "Therefore, even if appellate counsel had made such arguments, they would not have been successful." (*Id.*) The Court thereupon denied the petition "on the grounds that McGee was not prejudiced by his appellate counsel's performance." (*Id.*) On October 10, 2006, McGee's

petition for review was denied by the Wisconsin Supreme Court.

In order to exhaust state court remedies, a state prisoner must "establish that he fully and fairly presented his claims to the state appellate courts, thus giving the state courts a meaningful opportunity to consider the substance of the claims that he later presents in his federal challenge." *Bintz v. Bertrand*, 403 F.3d 859, 863 (7th Cir.2005) (*citing Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir.2003)). "Fair presentment in turn requires the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings." *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir.2004) (*citing O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). To do so requires a petitioner to "put forward operative facts and controlling legal principles." *Sweeney v. Carter*, 361 F.3d 327, 332 (7th Cir.2004).

In light of the procedural history recounted above, I conclude that McGee has exhausted his state court remedies on the issue he seeks to raise here. It is true that the substantive due process issue was not raised on the direct appeal of his commitment, but that was hardly McGee's fault. McGee did raise the issue in his pro se notice of intent to appeal that he filed on his own behalf before counsel was appointed. (Pet. for Habeas Corpus, Ex. D.) His court-appointed attorney elected not to pursue the issue, however, and instead concentrated on the issue of whether the burglary which was alleged as the predicate offense

was sexually motivated. When his appellate attorney's effort failed, McGee filed his *Knight* petition alleging the his appellate counsel was ineffective in failing to press the issue on his appeal. Although McGee's presentation of the issue was not pristine (few pro se petitions are), I conclude the state courts had a fair opportunity to consider the gist of the McGee's claim, which was that due process was violated because of the state's reliance upon a diagnosis not recognized in the field of mental health as a basis to civilly confine an individual indefinitely. (Pet. to Dismiss, Ex. D. at 6.) The fact that McGee's attorney did not raise the issue on direct appeal is of no consequence since McGee presented the issue to the Wisconsin courts in the context of an ineffective assistance of counsel claim. McGee's state petition for habeas corpus, along with his petition for review of the Court of Appeal's decision denying his petition, afforded the Wisconsin courts a full and fair opportunity to address his claim that a commitment based on a diagnosis of "personality disorder, not otherwise specified, with antisocial features" does not comport with due process.

I therefore conclude that McGee has exhausted his state court remedies and respondent's motion to dismiss (Doc. # 10) is DENIED. Within 30 days of the date of this order respondent is directed to answer the petition, complying with Rule 5 of the Rules Governing § 2254 Cases, and showing cause, if any, why the writ should not issue. Respondent's brief on the merits of the petition, including the question of

whether the petitioner's claim was "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), is due by June 1, 2007. Petitioner may file a reply, if any, by June 20, 2007.

Respondent's motion to dismiss Steve Watters as a respondent in this matter on the ground that he is not McGee's custodian and thus not a proper party (Doc. # 9) is unopposed and will therefore be GRANTED. Petitioner's motion to amend his petition (Doc. # 6) is DENIED as moot: the case will proceed on the merits of the petitioner's claim, meaning that the form of the petition is no longer relevant.

SO ORDERED.

E.D.Wis.,2007.
McGee v. Bartow
Not Reported in F.Supp.2d, 2007 WL 1062175 (E.D.Wis.)

Appendix D

West's Wisconsin Statutes Annotated
Chapter 980. Sexually Violent Person Commitments.
980.01. Definitions
In this chapter:

* * * *

(2) "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

* * * *

(7) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.

* * * *

Appendix E

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.